

FEB 27 1990

JOSEPH F. SPANOL, JR.
CLERK

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1989

RITA IRIS FISHMAN, PETITIONER

- VS.

THE STATE OF TEXAS, RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO THE
COURT OF APPEALS FOR THE THIRTEENTH SUPREME
JUDICIAL DISTRICT OF TEXAS AND TO THE
TEXAS COURT OF CRIMINAL APPEALS

APPENDIX TO PETITION

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February 27, 1990

89 PP



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CAUSE NO. 13-88-181-CR

(Tr. Ct. No.
88-CR-87-E)

RITA IRIS FISHMAN,

Appellant,

v.

THE STATE OF TEXAS,

Appellee,

on appeal to this Court from Cameron County,
Texas.

* * * * *

JUDGMENT

On appeal from the 357th District Court of Cameron County, Texas, from a judgment signed April 21, 1988. Opinion by Justice Fortunato P. Benavides. Opinion ordered published. Tex. R. App. P. 90.

THIS CAUSE was submitted to the Court on January 5, 1989, on oral argument, the record, and briefs. These having been examined and fully considered, it is the opinion of the Court that there was no error in the judgment of the court below, and said judgment is hereby AFFIRMED against appellant, RITA IRIS FISHMAN.

Costs of the appeal are adjudged against appellant, RITA IRIS FISHMAN. It is further ordered that this decision be certified below for observance.

* * * * *

BETH A. GRAY, CLERK



NUMBER 13-88-181-CR

COURT OF APPEALS

THIRTEENTH JUDICIAL DISTRICT OF TEXAS

CORPUS CHRISTI

* * * * *

RITA IRIS FISHMAN, Appellant,

v.

THE STATE OF TEXAS, Appellee.

* * * * *

On appeal from the 357th District Court of
Cameron County, Texas.

* * * * *

Before Fortunato P. Benavides; Norman L.
Utter; and J. Bonner Dorsey; J.J.

* * * * *

O P I N I O N

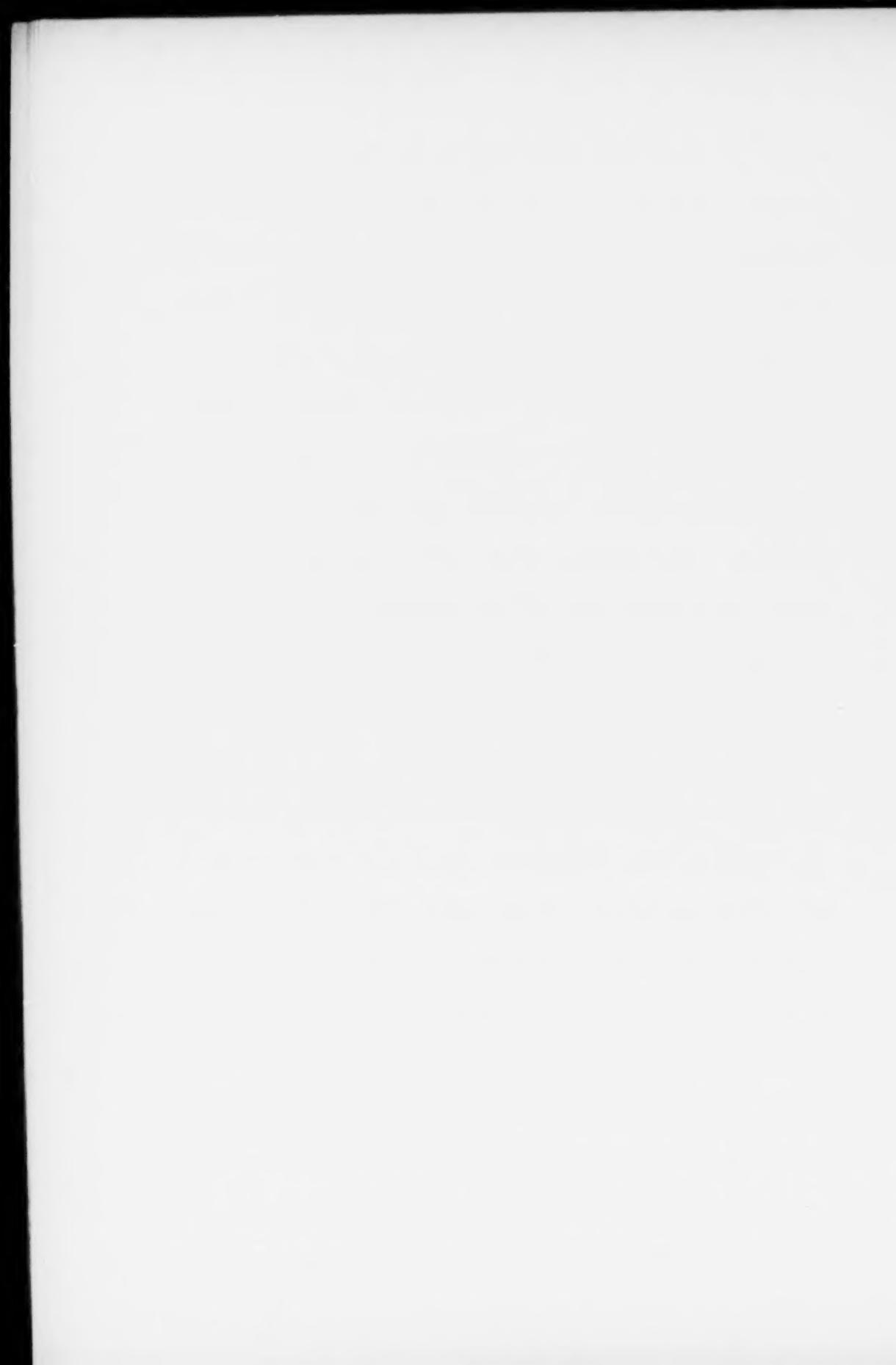
Appellant, Rita Iris Fishman, was convicted by a jury for the murder of her husband. The jury assessed her punishment at ten years' confinement in the Texas Department of Corrections. Appellant timely filed a written notice of appeal and, in accordance with Tex. R. App. P. 53(j)(2), filed an affidavit of indigency requesting a free statement of facts and transcript.



After a hearing was held on the indigency issue, the trial court entered an order finding that appellant was not indigent. From this order appellant presents this appeal asserting eight points of error.

By points one, three, four, five, seven, and eight, appellant contends that the trial court abused its discretion in finding appellant was not indigent and, thus, deprived her of an appeal in violation of the state and federal constitutions. She further requests that the court provide her with a free appellate record of the jury trial and related proceedings.

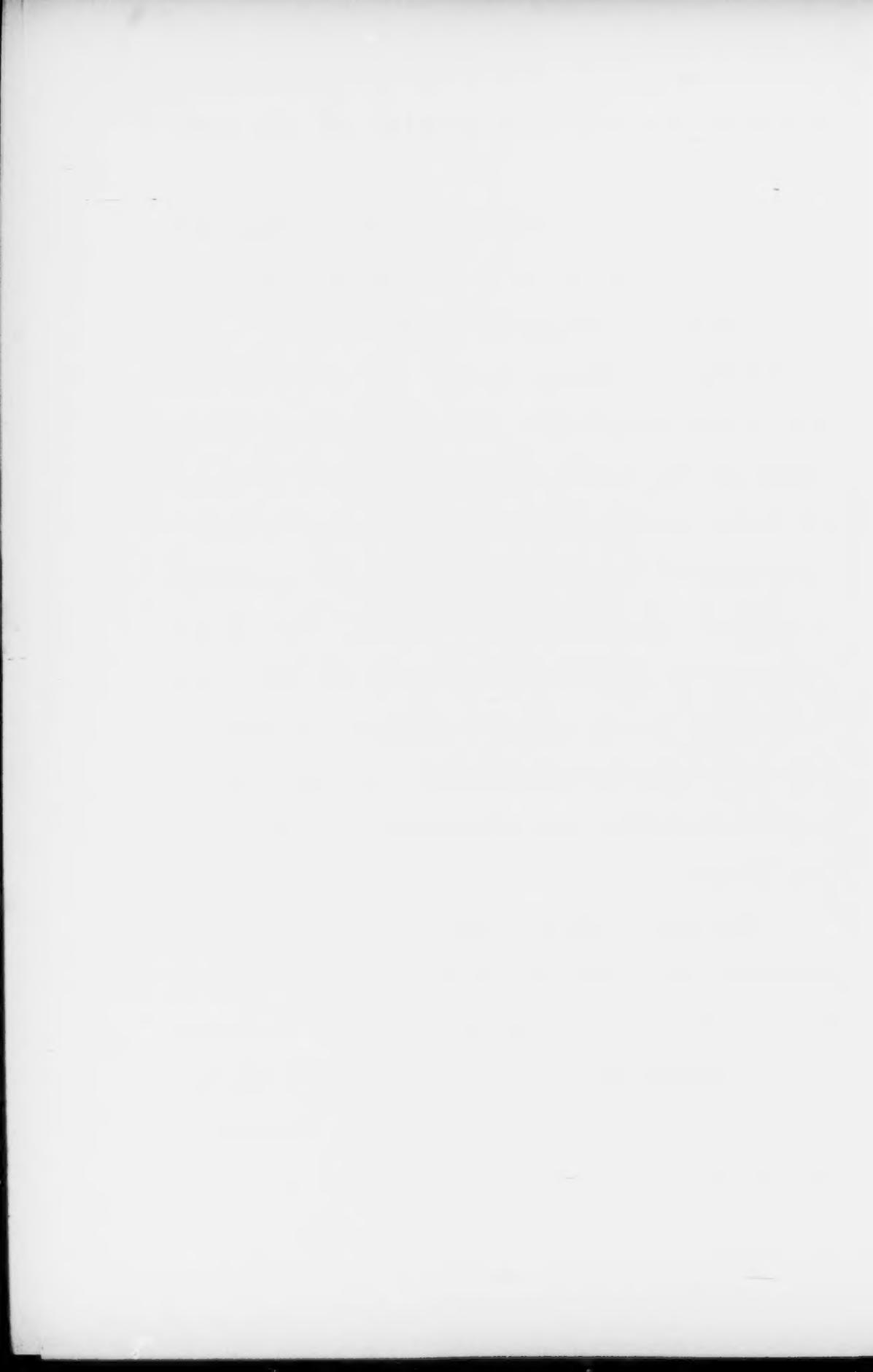
The State contends that the record does not affirmatively show that the trial court abused its discretion in finding that appellant was not indigent. The State argues that appellant did not prove that she was unable to pay for all or a portion of the record or, alternatively, provide



security for all or a portion of the same.
We agree.

The record reflects that appellant filed with the trial court an affidavit of indigency asserting that she had "insufficient money, property, or assets of any kind available to pay for or give security in order to pay for the statement of facts and the transcript in this cause." (emphasis added). Appellant further requested the court to order the court reporter to furnish a statement of facts and transcript at no expense to her. A hearing was conducted on the matter. At the hearing appellant called two witnesses to testify on her behalf.

Cynthia Garza, the official court reporter for the 357th District Court in Cameron County, testified that she recorded the statement of facts at appellant's murder trial. Garza testified that the statement of facts consisted of approximately 2,000



pages and would cost approximately nine thousand dollars to prepare.

Carlos Vela, the guardian of the estate of appellant's daughter, testified at the hearing that he was familiar with the extent of appellant's assets. According to Vela, appellant had been unemployed for approximately 10 to 13 years and had a negative net worth.

Vela testified that appellant's assets consists only of her community interest in her homestead and an adjacent lot. Vela testified that appellant's 1/2 interest in her homestead and the 1.38 acre adjacent lot were valued at approximately \$42,000.^{1/} He further testified that appellant's outstanding share of the mortgage on the homestead was approximately \$13,000.

1/ An inventory, appraisement, and list of claims that was filed with the court reflects that the total appraised value of the homestead is \$69,500, and the total value of the other property is \$14,500.00.



Likewise, Vela introduced appellant's 1987 tax return which shows that her adjusted gross income of 1987 was \$5,707.00. The tax return also shows that in 1987 appellant declared an additional income of \$7,403.17; however, Vela testified that this income was from interest earned on accounts held for the benefit of appellant's daughter. The record reflects that Vela prepared an inventory, appraisement, and list of claims for the estate of appellant's daughter. This inventory was filed with the trial court and, during the indigency hearing, the court took judicial notice of the document. This document reveals that appellant's daughter inherited \$147,518.44 from her father's death, which was placed in trust with the U.S. District Clerk and deposited in the First City National Bank in Houston, Texas. According to Vela, appellant initially received the interest on this money, but that a judge for the U.S.



District Court ordered that those amounts now be paid to the guardian of the daughter's estate.

Vela further testified that appellant had two money judgments entered against her. On July 21, 1988, a hearing was held for the appointment of a permanent guardian for appellant's daughter. At the hearing, the judge ordered appellant to reimburse her daughter's estate for the amount of \$39,154.76. Vela also testified that he knew that a wrongful death civil action had been brought against appellant which resulted in a money judgment being entered against her. Vela, however, was not aware of the amount of this judgment.

Although appellant's witnesses were cross-examined, the State did not introduce any evidence at the indigency hearing. The State merely asked the court to make the record reflect that appellant had retained two lawyers to represent her.

It is well established that an appellate review of criminal convictions is provided in this state; therefore, a trial judge has a duty under the federal and state constitutions to provide an indigent defendant with an adequate record on appeal. *Griffin v. Illinois*, 351 U.S. 12 (1956); *Abdnor v. State*, 712 S.W.2d 136, 139 (Tex. Crim. App. 1986).

Tex. R. App. P. 53(j)(2) provides that:

Within the time prescribed for perfecting the appeal an appellant unable to pay for the statement of facts may, by motion and affidavit, move the trial court to have the statement of facts furnished without charge. After hearing the motion, if the court finds that the appellant is unable to pay for or give security for the statement of facts, the court shall order the reporter to furnish the statement of facts, the court shall order the reporter to furnish the statement of facts . . . (emphasis ours).

A determination of indigence must be made on a case by case basis. Abdnor, 712 S.W.2d at 141; *Zanghetti v. State*, 582 S.W.2d 461

(Tex. Crim. App. 1979). The determination is to be made at the time of the appeal and not at the time of trial. Barber v. State, 542 S.W.2d 412 (Tex. Crim. App. 1976). Likewise, the court is to consider the financial condition of the appellant and not that of his parents or other relatives. Abdnor, 712 S.W.2d at 142; Ex Parte King, 550 S.W.2d 691 (Tex. Crim. App. 1977).

The factors to be considered in deciding the issue of indigency are the nature of the defendant's employment, the amount of the defendant's earnings and expenses, and the defendant's ability to secure a bond and retain counsel. Turner v. State, 725 S.W.2d 409, 410 (Tex. App.---Houston [1st Dist.] 1987, no pet.). However, an appellant will not be deprived of his right to a free statement of facts on appeal merely because he was represented by retained counsel at trial. Abdnor, 712 S.W.2d at 142. Retained trial counsel is

not bound to furnish an appellate record at his own expense or to handle the appeal without a fee. Id.

In the case now before us, we cannot find that the trial court abused its discretion in failing to find that appellant could not pay for or give security for a \$9,000 statement of facts. Appellant did not introduce any evidence concerning her living expenses. Although there was evidence that appellant had been unemployed, the record reflects that appellant was able to secure bond and retain counsel. Likewise, the record reflects that she had approximately \$30,000 in equity in her homestead and adjacent real property. There was no evidence that the adjacent 1.38 acre lot was mortgaged, and there was no evidence that a judgment lien had been levied against it. Furthermore, the appellant did not introduce any evidence demonstrating why the adjacent property could not legally be



incumbered or sold in order to provide security or pay for the statement of facts and transcript.

We, therefore, refuse to hold that the trial court abused its discretion. Accordingly, we overrule appellant's first, third, fourth, fifth, seventh, and eighth points of error.

By her second point of error, appellant contends that the court, in making its determination, erroneously considered only oral testimony and did not consider documentary evidence which had been entered into evidence and judicially noticed by the trial court. We have reviewed the record and find appellant's contention without merit and not supported by the record. Appellant's second point is overruled.

Appellant further assists by point six, that the prosecutor committed constitutional misconduct in opposing her *prima facie* case, "with nothing but lawyer



talk." Again, we have considered appellant's complaint and find it to be without merit. Accordingly, we overrule appellant's sixth point of error.

Having found no reversible error, we affirm the judgment of the trial court.

/s/

FORTUNATO P. BENAVIDES, Justice

Opinion ordered published. Tex.R.App. 90

Opinion delivered and

filed this the 20th

day of April, 1989.



IN THE NAME AND BY THE AUTHORITY OF THE
STATE OF TEXAS

THE GRAND JURORS, for the County of Cameron, State aforesaid, duly organized as such at the January Term, A.D. 1988, of the 107th Judicial District Court in and for said County, upon their oaths in said Court, present that RITA IRIS FISHMAN hereinafter called Defendant, on or about the 6th day of June A.D. One Thousand Nine Hundred and Eighty-one and anterior to the presentment of this indictment, in the County of Cameron and State of Texas, did then and there unlawfully, intentionally and knowingly cause the death of SAMUEL RICHARD FISHMAN, the deceased, by SHOOTING THE DECEASED WITH A FIREARM,

AND THE GRAND JURORS AFORESAID, upon their Oaths in said Court, do further present that Defendant, on or about the above mentioned date, and anterior to the presentment of this Indictment in the County of Cameron and State of Texas did then and there unlawfully, with intent to cause serious bodily injury, commit an act clearly dangerous to human life that caused the death of the above mentioned deceased, such act being as follows: SHOOTING THE DECEASED WITH A FIREARM,

against the peace and dignity of the State.

/s/

Foreman of the Grand Jury



CAUSE NO. 88-CR-87-E

THE STATE OF TEXAS) (IN THE 357TH
VS.) (DISTRICT COURT OF
RITA IRIS FISHMAN) (CAMERON COUNTY,
TEXAS

JUDGMENT ON JURY VERDICT OF GUILTY
PUNISHMENT FIXED BY THE JURY NO
PROBATION GRANTED

Judge Presiding: Rogelio Valdez Date of Judgment: April 1988

Attorney for State: Ricardo Lara

Attorney for Defendant: Thomas Sullivan

Offense Convicted Of: Murder

Degree: Felony 1st Degree Date Offense
Committed:
June 6, 1981

Charging

Instrument: Indictment

Plea: Not Guilty

Jury Verdict: Guilty
Foreman: Phillip Turner

Plea to Enhancement Enhancement
Paragraph(s) N/A Paragraph(s): N/A

Findings on Use of Deadly Weapon:

Affirmative finding that a deadly weapon was used in the commission of this offense was made by the jury.



Date Sentence Imposed: April 6, 1988
Costs: \$75.00

Punishment and Place
of Confinement: Ten (10) years TDC

Date to Commence: April 6, 1988

Time Credited: Total amount of
Restitution Reparation: N/A

Concurrent Unless
Otherwise Specified: N/A

Be it REMEMBERED that on the 28th day of March, 1988, this cause was called to trial and the State appeared by her Assistant Criminal District Attorney, and the Defendant, Rita Iris Fishman, appeared in person, her counsel by employment, the Hon. Thomas Sullivan also being present, and the Defendant, having been duly arraigned, pleaded Not Guilty and both parties announced ready for trial; thereupon a jury of good and lawful persons, to wit: Phillip Turner and eleven others, was duly selected, empaneled and sworn according to the law and charged by the Court on separation;



whereupon said cause was recessed until March 29, 1988.

THEREAFTER, on March 29, 1988, the indictment was read to the jury and the Defendant entered her plea of Not Guilty thereto whereupon the State introduced evidence, whereupon said cause was recessed until March 30, 1988.

THEREAFTER, on March 30, 1988, the State continued to introduce evidence whereupon said cause was recessed until March 31, 1988.

THEREAFTER, on March 31, 1988, the State continued with their evidence and rested. Defendant made motion for directed verdict and was denied by the Court.

Defendant introduced evidence and said cause was recessed until April 4, 1988. Thereafter, on April 4, 1988, the defendant continued with their evidence and rested. Both sides offered rebuttal evidence. All



parties closed and the Jury was sent home until April 6, 1988.

THEREAFTER, on April 6, 1988, the charge was prepared and submitted to all counsel. The Court charged the jury as to the law applicable to said cause and argument of counsel for the State and the Defendant was duly heard and concluded, and the jury retired in charge of the proper officer to consider their verdict, and afterward was brought into open court by the proper officer, the Defendant and her counsel being present, and in due form of law returned into open court the following verdict, which was received by the Court and is here now entered upon the Minutes of the Court, to wit:

"We, the Jury, find the Defendant, RITA IRIS FISHMAN GUILTY OF MURDER AS CHARGED IN THE INDICTMENT.

S/ Phillip Turner
Foreman



SPECIAL ISSUE

Do you find from the evidence beyond a reasonable doubt that the Defendant, RITA IRIS FISHMAN, used a deadly weapon during the commission of the offense for which you have found her guilty.

You will answer "Yes" or "No". Yes

S/ Phillip Turner
Foreman"

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED by the Court that the Defendant, Rita Iris Fishman, is guilty of the offense of Murder as found by the jury, and that said offense was committed on June 6, 1981.

THEREUPON, the Defendant, having previously elected in writing to have her punishment assessed by the same jury, the same jury was duly empaneled to assess said Defendant's punishment in said cause, and the evidence submitted for the State and for the Defendant was duly heard, and at the conclusion of such evidence, the Court charged the jury with additional instructions as to the law applicable to



punishment of said cause and arguments of State and Defendant were duly heard and concluded and the jury retired in charge of the proper officer to consider their verdict as to Defendant's punishment, and thereafter returned into open court, accompanied by the proper officer, the Defendant and her counsel being present, and in due form of law, the following verdict, which was received by the Court is here now entered upon the Minutes of the Court, to wit:

"We, the Jury, having found the Defendant, Rita Iris Fishman, Guilty of Murder as charged in the indictment, assess her punishment at confinement in the Texas Department of Corrections for 10 years, being not less than Five (5) years nor more than Ninety-nine (99) years, and assess a fine of \$ -0-. (Answer in dollars and cents, not exceeding \$10,000.00 or "None").

S/Phillip Turner
Presiding Juror"

IT IS, THEREFORE, CONSIDERED AND ADJUDGED BY THE COURT that the Defendant, Rita Iris Fishman, is guilty of the offense of Murder as found by the Jury, and that she



be punished, as found by the Jury, that is by confinement in the Texas Department of Corrections for a period of ten (10) years and that the State of Texas do have and recover of and from said Defendant all costs in this prosecution, for which execution may issue. The Court has made and hereby makes an affirmative finding that the Defendant, Rita Iris Fishman, used a deadly weapon during the commission of this offense as found by the Jury and that the deadly weapon used by the Defendant was a firearm and this affirmative finding is made a part of this sentence in accordance with the provisions of Article 42.12, Section 3f(a) (2) Code of Criminal Procedure of the State of Texas. And thereupon, the Defendant, Rita Iris Fishman, was asked by the Court whether she had anything to say why said sentence should not be pronounced against her, and she answered nothing in bar thereof. Whereupon, the Court proceeded, in the presence of the



said Defendant, Rita Iris Fishman, to pronounce sentence against her as follows:

It is the order of the Court that the Defendant, Rita Iris Fishman, who has been adjudged to be guilty of Murder and whose punishment has been assessed by the Jury at confinement in the Texas Department of Corrections for a term of ten (10) years, be delivered by the Sheriff of Cameron County, Texas, immediately to the Director of Corrections of the Texas Department of Corrections, or other person legally authorized to receive such convicts, and the said Rita Iris Fishman shall be confined in said Texas Department of Corrections for a term of ten (10) years, in accordance with the provisions of the law governing the penitentiaries and the Texas Department of Corrections; it is further ordered by the Court that the Defendant be credited on this sentence with 000 days, on account of the time spent in jail in said cause since her



arrest and confinement until sentence was pronounced by the Court. And the said Rita Iris Fishman is hereby remanded to jail until said Sheriff can obey the directions of this sentence.

SIGNED FOR ENTRY: April 21, 1988.

/s/ Rogelio Valdez
Judge Presiding



CAUSE NO. 88-CR-87-E

THE STATE OF TEXAS § IN THE 357TH
VS. § DISTRICT COURT OF
RITA IRIS FISHMAN § CAMERON COUNTY,
§ TEXAS

DEFENDANT'S AFFIDAVIT OF INDIGENCY

BEFORE ME, the undersigned authority,
personally appeared the above Defendant, who
being by me duly sworn on oath said:

"My name is RITA IRIS FISHMAN
and I am the Defendant in the above styled
and numbered cause. On April 21
1988, the judgment and imposition of
sentence was entered against me in this
cause. I have given Notice of Appeal to the
Court of Appeals for the Thirteenth
Supreme Judicial District of Texas, sitting
in Corpus Christi, Texas. Other than my
personal possessions and several other
assets, having a total value of much less
than \$9,000, and my undivided interest in
one-half of our residence. I am indigent
and live on a very limited income. After
normal living expenses are provided for, I
have insufficient money, property or assets
of any kind available to pay for or give
security in order to pay for the Statement
of Facts or Transcript in this cause. I have
been informed that the trial court reporter
estimates that she will need \$9,000 to pay
the expense of preparing the statement of
facts in the above case. I am unable to pay
the reporter that \$9,000. I hereby request
that the Court order the court reporter to



furnish a Statement of Facts of the entire trial proceedings at no expense to me and to further order the Clerk to furnish the Transcript in this cause at no expense to me."

/s/ Rita Iris Fishman
AFFIANT

SWORN TO AND SUBSCRIBED before me, this
the 23rd day of June, 1988.

/s/ Emma Garcia
Notary Public In and For
The State of Texas



CAUSE NO. 88-CR-87-E

THE STATE OF TEXAS § IN THE 357TH
VS. § DISTRICT COURT OF
RITA IRIS FISHMAN § CAMERON COUNTY,
TEXAS

O R D E R

On this the 23rd day of June, 1988, the District Clerk presented to the Court the Defendant's Affidavit of Indigency. It is ordered by the Court that the court's clerk shall promptly notify the parties' attorneys of record that this case is hereby set for a hearing on Defendant's said Affidavit on the 4th day of August, 1988, at 9:00 o'clock A.m.

/s/ Rogelio Valdez
JUDGE PRESIDING



CAUSE NO. 88-CR-87-E

THE STATE OF TEXAS : IN THE 357TH
VS. : DISTRICT COURT OF
RITA IRIS FISHMAN : CAMERON COUNTY,
TEXAS

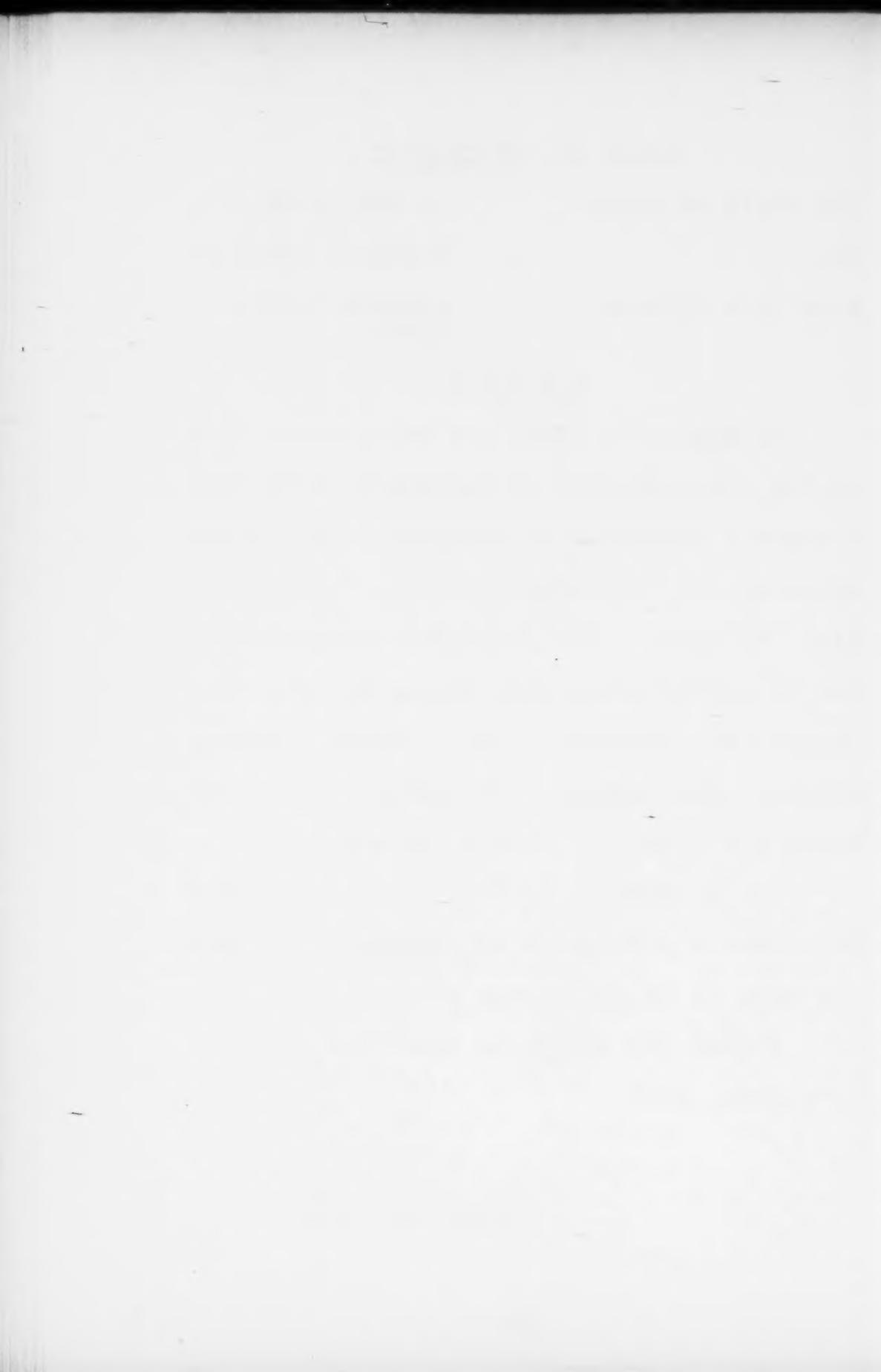
O R D E R

On August 4, 1988, the above cause came on for consideration of Defendant, RITA IRIS FISHMAN'S Affidavit of Indigency. The State appeared by Assistant District Attorney, Rick E. Lara. The Defendant appeared in person and by attorneys, Thomas Sullivan and Joseph A. Connors, III. After hearing evidence and argument of counsel, the Court found the Defendant is not indigent.

IT IS ORDERED by the Court that this Defendant's Affidavit of Indigency be and the same is in all things denied.

SIGNED FOR ENTRY on this the 29th day of August, 1988.

/s/ Rogelio Valdez
JUDGE PRESIDING



CAUSE NO. 88-CR-87-E

THE STATE OF TEXAS § IN THE 357TH
VS. § DISTRICT COURT OF
RITA IRIS FISHMAN § CAMERON COUNTY,
TEXAS

O R D E R

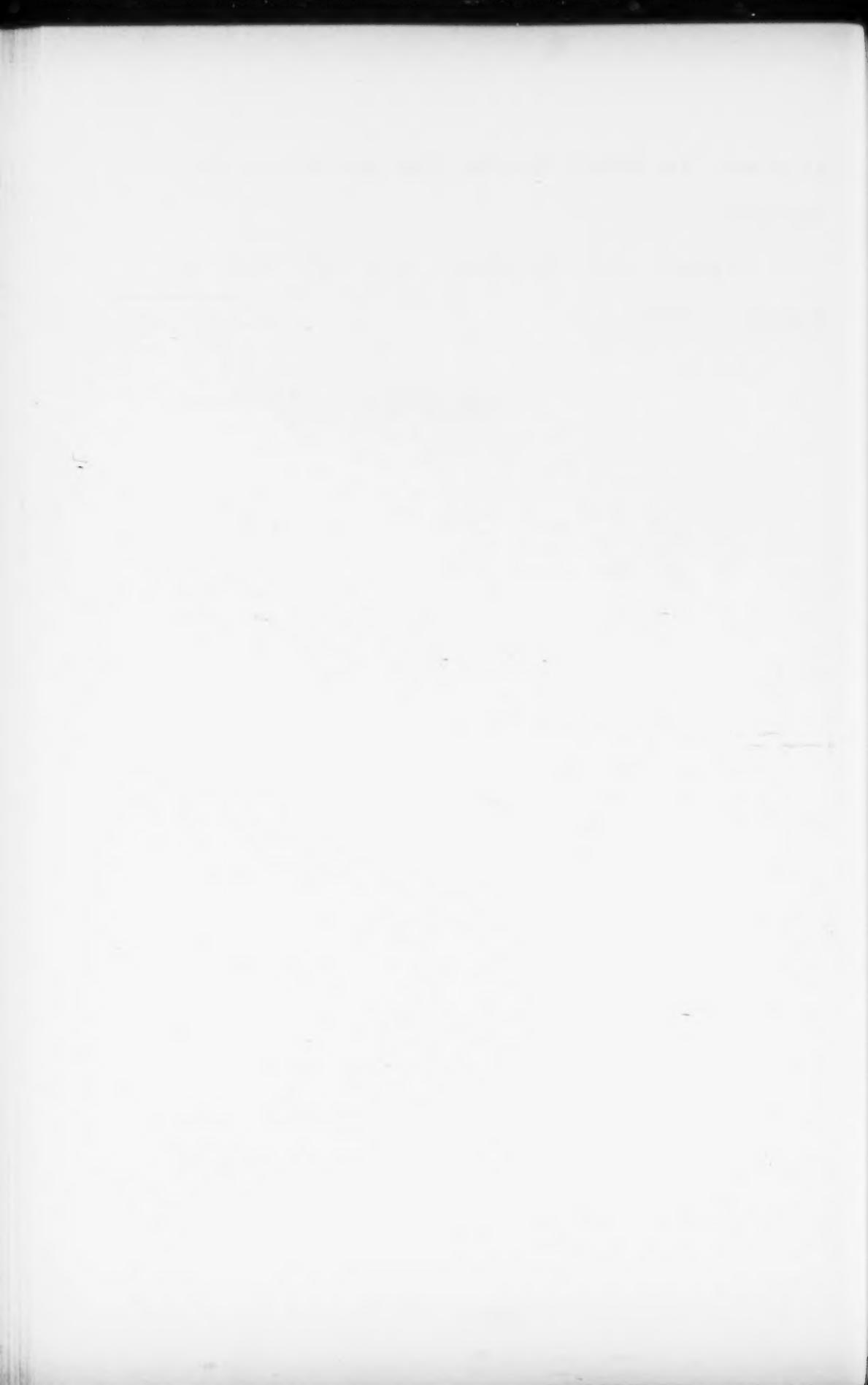
On this the 29 day of August, 1988, came on to be considered the request of defendant RITA IRIS FISHMAN, that the district court instruct both the district clerk to furnish the Court of Appeals a full transcript on indigency and the court reporter to furnish at no cost to her a statement of facts of the indigency hearing conducted in this case on the 4th day of August, 1988, for the purpose of her appeal on the issue of her indigency, and having considered the request, the court ruled. It is Ordered, Adjudged and Decreed by the Court that defendant RITA IRIS FISHMAN'S SAID requests be and the same are hereby



granted, to which action the defendant duly
excepts.

Signed and Entered this 29 day of
August, 1988.

/s/ Rogelio Valdez
JUDGE PRESIDING



Cause No. 22-582-A

ESTATE OF § ON THE COUNTY COURT
AMY MICHELLE FISHMAN, § AT LAW NO. 1
A MINOR § CAMERON COUNTY,
 TEXAS

ORDER APPOINTING PERMANENT GUARDIAN

On the 21st day of July, 1988, a hearing was held for the appointment of a permanent Guardian of the Person and of the Estate of Amy Michelle Fishman, a minor; and personally appeared Carlos F. Vela, Temporary Guardian of the Estate, the Department of Health and Resources, the Temporary Guardian of the Person and Rita I. Fishman, in person and, by and through her attorney and announced ready; the Court found that it had jurisdiction and venue over this matter and after hearing the evidence and the argument of counsel, the court was of the opinion and made the following Orders:



It is therefore ORDERED that Rita I. Fishman be and is hereby appointed Permanent Guardian of the Person Amy Michelle Fishman, a minor. It is further ORDERED that no bond will be required from said Guardian.

The court does however, find that the said Rita I. Fishman has used monies from the estate of said child for personal expenses which were the obligation of the natural parent of said child and hereby orders reimbursement of said expenses by Rita I. Fishman to the estate of Amy Michelle Fishman, a minor:

It is therefore ORDERED that Rita I. Fishman reimburse the amount of 39,154.75 dollars to the estate of Amy Michelle Fishman, a minor.

It is further ORDERED that Carlos F. Vela shall continue as Temporary Guardian of the estate of Amy Michelle Fishman, a minor, until a Permanent Guardian is appointed by



this court. Said Temporary Guardian shall continue to serve without bond.

It is further the ORDER of this Court that the Temporary Guardian shall file an Amended report in this case with regard to the inventory and appraisement of the Estate of said minor no later than August 12th, 1988.

SIGNED FOR ENTRY THIS 26th day of July,
1988.

/s/ Noe Robles
Judge Presiding



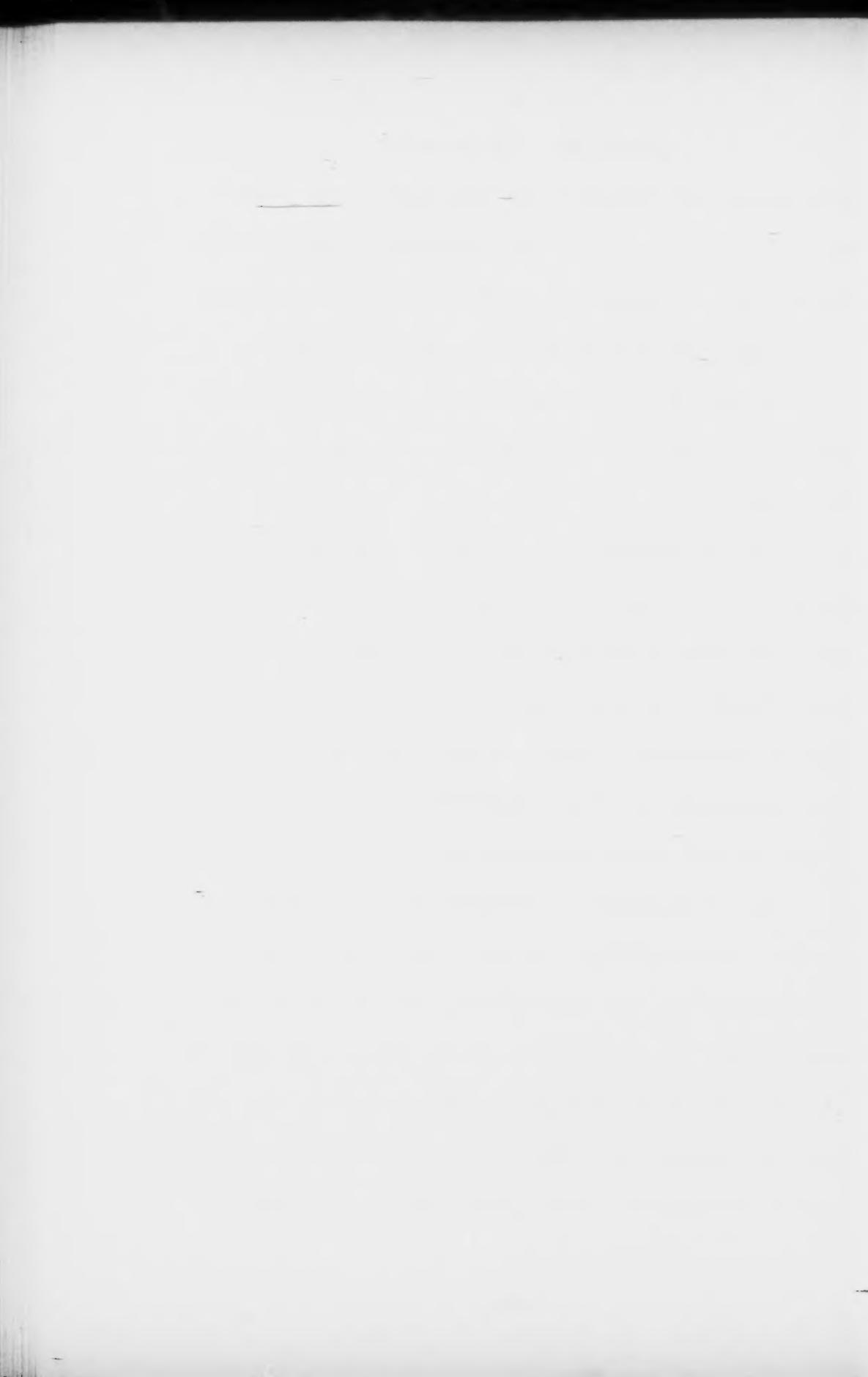
CAUSE NO. 88-CR-87-E

THE STATE OF TEXAS * IN THE DISTRICT COURT
*
VS. * OF CAMERON COUNTY, TEXAS
*
RITA IRIS FISHMAN * 357TH JUDICIAL DISTRICT

MOTION FOR NEW TRIAL OR ACQUITTAL

RITA IRIS FISHMAN, the Defendant now comes and files this motion for new trial, because:

1. The district court should set aside the jury's verdict and enter an acquittal because the homicide was as a matter of law justified, having occurred in self-defense while defendant was defending herself and the sanctity of her residence, of which she legally had sole possession.
2. To defendant's prejudice, the district court reversibly erred in failing, as requested by the defendant, to replace "her" for "his" in the final line of paragraph 11 in the Court's Charge to the Jury at the not guilty phase of the trial. This pronoun error confused the jury on an essential



defensive issue that when the jury was considering self-defense, the deceased's words, etc. had to be viewed only from the view point of her, the defendant, not that of his, the deceased, when the jury was considering self-defense.

3. To defendant's prejudice, the district court reversibly erred in failing to instruct the jury, as requested by defendant, that parole is not an issue for the jury and should not be considered by the jury, since parole is the exclusive prerogative of the Board of Parole and Pardons, and/or the Governor, as evidence by the jury's "parole note, this jury considered parole during the deliberations. Defendant was harmed by the jury's consideration of parole during jury deliberations.

4. To defendant's prejudice, the district court reversibly erred in sustaining and excluding Opal Lynch's testimony as to what



the deceased's minor child Amy said in front of Ms. Lynch, the defendant and the deceased. Amy's comments and the deceased's immediate physical reactions thereto were admissible. See V. T. C. A. Penal Code 19.06 (1979). Such excluded evidence supported the defensive theory that Amy had been punished by the deceased by locking or closing Amy up in a dark closet. Further, it is the only incidence of outside, independent and non-familial corroboration of such family violence.

5. To defendant's prejudice, the district court reversibly erred in denying the requested defense instruction that before using deadly force, a person has no duty to retreat in one's own home. Without said requested instruction, the district court mislead the jury as to the defendant's lack of duty to retreat in the circumstances before the jury in the above case.



6. To defendant's prejudice, the district court reversibly erred in failing to instruct the jury on the defendant's right to defend her property and the sanctity of her residence, which residence had previously been judicially awarded solely to her to possess to the exclusion of the deceased.

7. To defendant's prejudice, the district court reversibly erred in not requiring the state to elect between counts one and two of the indictment. Defendant was harmed because all twelve jurors were not required to be unanimous in deciding the defendant was guilty of committing murder in one but not both of the manners alleged in counts one and two of the indictment in the above case.

8. To defendant's prejudice, the district court reversibly erred in overruling defendant's objection and assertion of the attorney-client privilege when the court



ordered defendant's counsel to produce certain photographs. Those photographs had been secured by defense counsel as a result of the attorney-client's communication and relationship. After receiving those photographs, the state introduced some of them before the jury.

9. To defendants' prejudice, the District Court reversibly erred in overruling defendant's timely objection to the admission of Joe Garza's opinion as a ballistic expert on the distance from which each shot was fired. Mr. Garza was not an expert in the area in question. Defendant was harmed because this unqualified opinion helped to destroy her defensive theory of self-defense. Such an unqualified opinion from Joe Garza could not assist the jury in determining if the closest shot was the first or last shot.

10. Thus, the above defendant requests that the court conduct a hearing on the above,



and grant an acquittal or at least a new trial.

Respectfully submitted
by Defendant's Attorneys,

/s/ Thomas Sullivan
Thomas Sullivan
Texas Bar No. 194918900
1185 FM 802, Suite 4
Brownsville, Texas 78520
(512) 544-4500

Joseph A. Connors III
Texas Bar No. 04705400
804 Pecan St.
McAllen, Texas 78502-5838
(512) 687-8217



VERIFICATION

THE STATE OF TEXAS

COUNTY OF CAMERON

BEFORE ME, the undersigned authority,
appeared THOMAS SULLIVAN, on the 5th of May,
1988 and who being by me duly sworn did
depose and state on his oath the following:

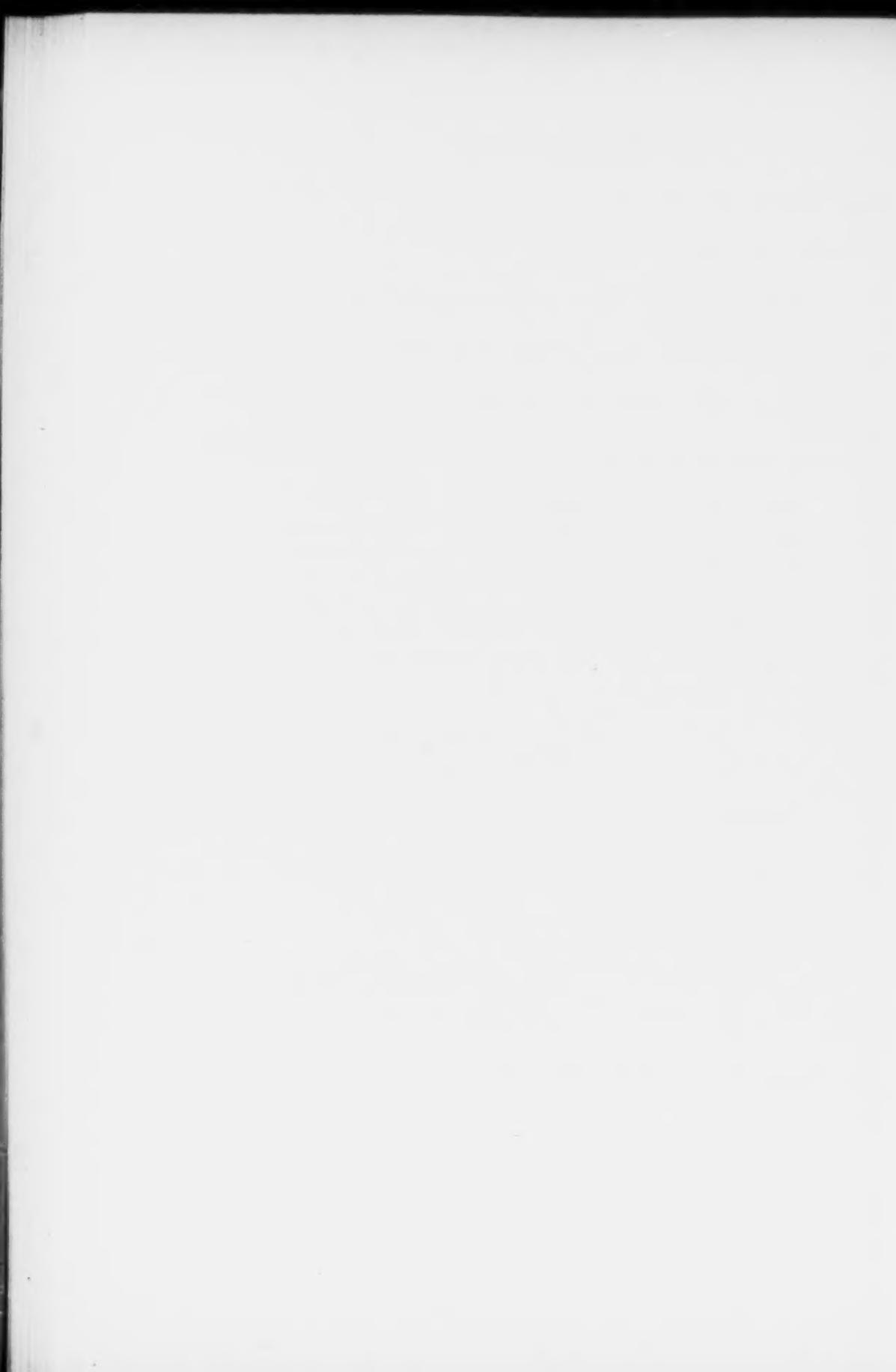
"My name is Thomas Sullivan, and I
am one of the defendant's counsel
in the above styled and numbered
cause. I have read the above and
foregoing motion and I hereby
swear that the facts contained
therein are true and correct.

/s/ Thomas Sullivan
Thomas Sullivan

SWORN TO AND SUBSCRIBED before me on
this the 5th day of May, 1988.

/s/ Jimmy Eaves
Notary Public In and for
the State of Texas

My commission expires: 07/07/90



IN THE 13TH COURT OF APPEALS, SITTING IN
CORPUS CHRISTI, TEXAS

RITA IRIS FISHMAN

§

ON APPEAL

VS.

§

FROM CAMERON

THE STATE OF TEXAS

§

COUNTY, TEXAS

MOTION TO ABATE APPEAL

Pursuant to Hicks v. State, 544 S.W.2d 424, 426 (Tex.Cr.App. 1976) and Abnor v. State, 712 S.W.2d 136, 144 (Tex.Cr.App. 1986), appellant moves the Court to abate this appeal and to remand the cause to the trial court for action consistent with this Court's opinion. As grounds, appellant points out:

- (1) On August 4, 1988, the district court in effect orally concluded appellant was not indigent after hearing evidence on appellant's affidavit of indigency for purposes of obtaining an appellate transcript and statement of facts in the above case.



- (2) On August 12, 1988, appellant timely filed notice of appeal from that "non-indigency hearing". Attached is a true copy of that notice of appeal, etc.
- (3) Few further appellate steps can be performed by appellant until the record from the "non-indigency" hearing are filed in this Court of Appeals.

Respectfully submitted by
APPELLANT'S ATTORNEYS,

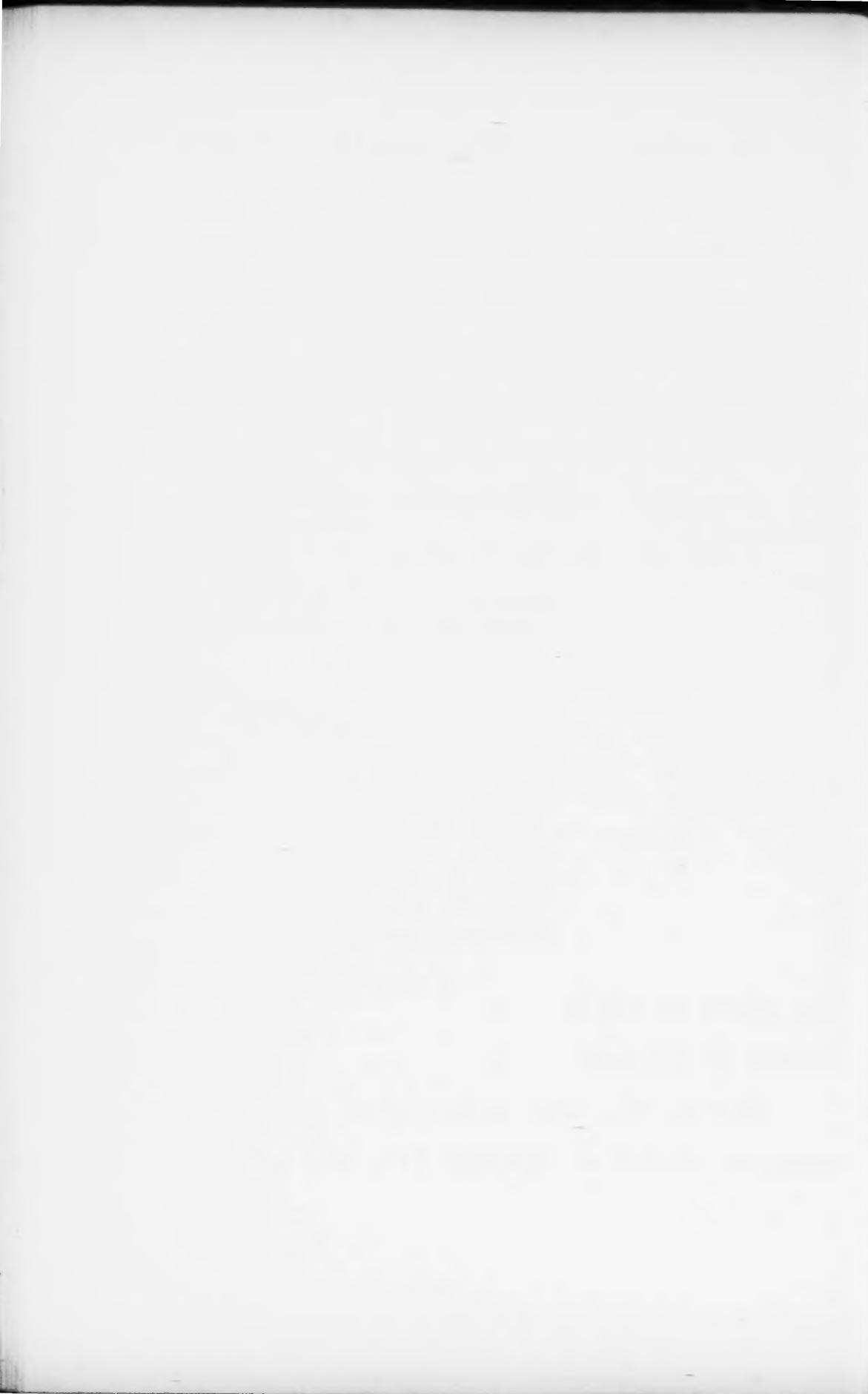
/s/ Joseph A. Connors III
JOSEPH A. CONNORS III
Texas Bar No. 04705400
McAllen, Texas 78502-5838
(512) 687-8217

THOMAS SULLIVAN
Texas Bar No. 19491800
1185 FM 802, Suite 4
Brownsville, Texas 78520

THE STATE OF TEXAS §

COUNTY OF HIDALGO §

BEFORE ME, the undersigned authority,
appeared JOSEPH A. CONNORS III, who being by



me duly sworn did depose and state on his oath the following:

"My name is Joseph A. Connors III, and I am one of the appellant's counsel in the above styled and numbered cause. I have read the above and foregoing motion. I hereby swear that the facts contained therein are true and correct."

/s/ Joseph A. Connors III
JOSEPH A. CONNORS III

SWORN TO AND SUBSCRIBED before me on this 15th day of August, 1988.

/s/ Belia C. Cerdá
Notary Public In And For
The State of Texas

CERTIFICATE OF SERVICE

I, JOSEPH A. CONNORS III certify that I mailed a copy of the foregoing Motion to the District Court, Judge Roy Valdez, and to the office of the Honorable Rick Lara, County and District Attorney of Cameron County, Texas; and to appellant on the 15th day of August, 1988.

/s/ Joseph A. Connors III
JOSEPH A. CONNORS III



Court of Appeals
Thirteenth Supreme Judicial District
TENTH FLOOR
NUECES COUNTY COURTHOUSE
CORPUS CHRISTI, TEXAS 78401

August 31, 1988

Thomas Sullivan
Downey & Sullivan
Attorneys at Law
1185 FM 802, Suite 4
Brownsville, Texas 78521

Joseph A. Connors, III
Attorney at Law
P.O. Box 5838
McAllen, Texas 78502

Ben Euresti, Jr.
County Criminal District Attorney
974 E. Harrison
Brownsville, Texas 78520

RE: CASE NO. 13-88-00181-CR
TRIAL COURT CAUSE NO. 88-CR-87-E

STYLE: Fishman Rita Iris
V: The State of Texas

The appellant's motion to abate appeal
was denied by the Court on this day.

Respectfully yours,

BETH A. GRAY, Clerk

By /s/ Cathy Wilborn
Deputy



NO. 13-88-181-CR

IN THE TEXAS COURT OF APPEALS,
THIRTEENTH SUPREME JUDICIAL DISTRICT
AT CORPUS CHRISTI, TEXAS

RITA IRIS FISHMAN, § Appeal of Cause No.
Appellant § 88-CR-87-E
 § From the 357th
VS. § District Court
 § Cameron County, Texas
 §
THE STATE OF TEXAS § Hon. Rogelio Valdez
 § Judge Presiding

BRIEF OF APPELLANT

[Note: In that brief, the appellant's eight points of error read as follows: see next page]



POINT OF ERROR NO. 1

The district court reversibly erred in denying appellant's affidavit of indigency, which was judicially noticed after being offered in the evidence (R. SI-10, 65; II-2-4), since the uncontroverted evidence of appellant's financial status left the district court no discretion under Tex.R.App.P. 53(j)(2) but to find appellant to be adequately indigent for purposes of obtaining at no personal cost the requested and designated appellate record of the jury trial and related proceedings.

POINT OF ERROR NO. 2

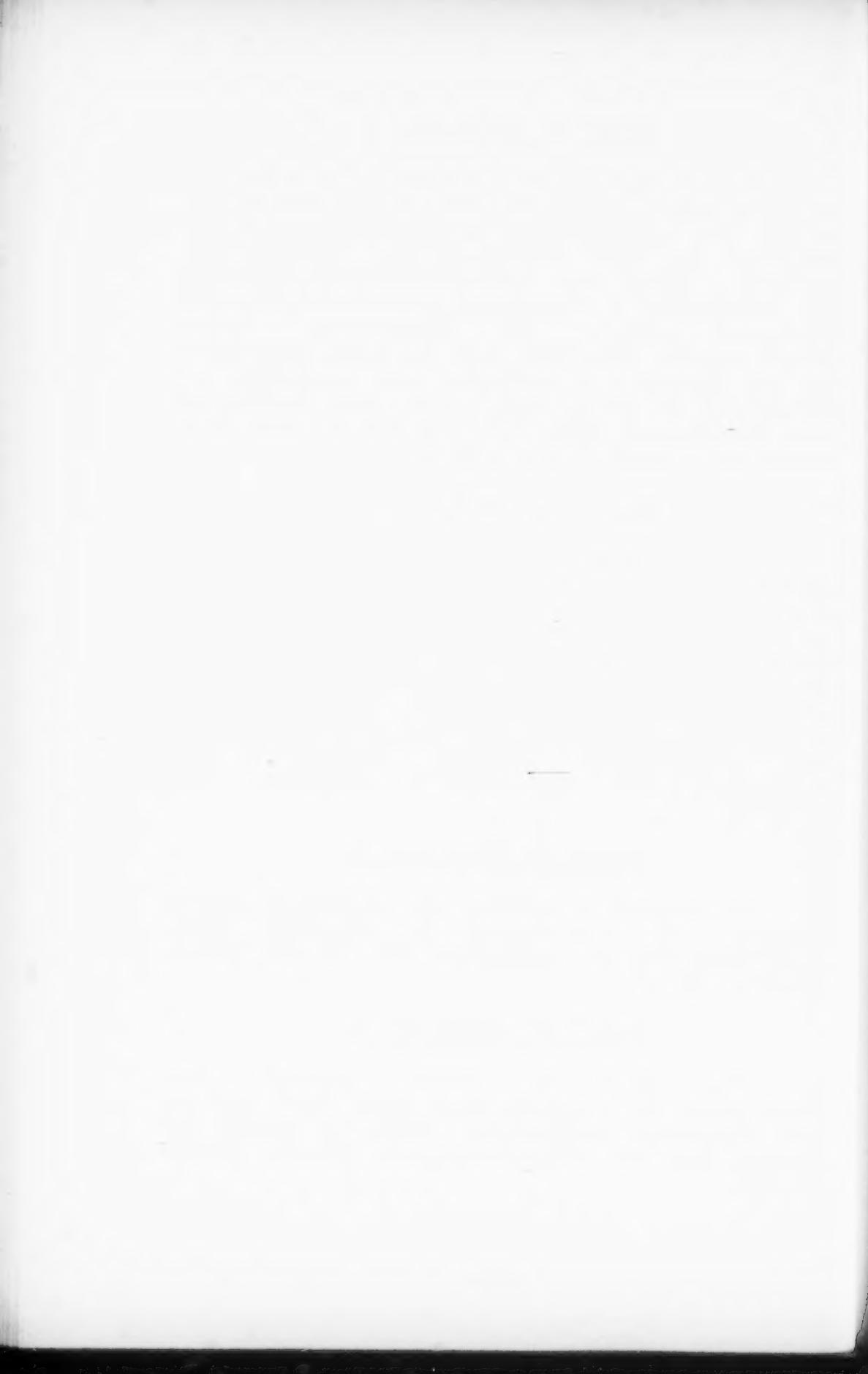
In determining the question of appellant's indigence the district court abused its discretion in limiting its consideration to only oral "evidence that I have heard" (R. II-28), since the court failed to consider the documentary evidence (R. SI-10, 20-49; SSI 2-3), which previously had been offered into evidence and judicially noticed (received in evidence) at appellant's request (R. II-2-4).

POINT OF ERROR NO. 3

On August 4, 1988, the district court abused its discretion in finding that appellant "is not indigent" (R. II-28, lines 17-18; SI-65).

POINT OF ERROR NO. 4

The district court abused its discretion in finding that appellant has at her disposal sufficient sums of money to obtain her own transcript (R. II-28, lines 18-20).



POINT OF ERROR NO. 5

In determining the question of appellant's indigence for purposes of obtaining a record on appeal, the district court abused its discretion in considering as relevant factors that appellant not only had retained counsel at the prior (motion for new trial) hearing but also is now being represented by attorneys Joseph Connors and Thomas Sullivan on August 4, 1988, (R. II-28-29, line 22 to line 3).

POINT OF ERROR NO. 6

The prosecutor committed constitutional misconduct in opposing this indigent appellant's prima facie case with nothing but lawyer talk (R. II-23-29).

POINT OF ERROR NO. 7(A) AND 7(B)

By denying her any right of a meaningful merits appeal of the conviction in this case, the district court violated this indigent appellant's right to: (A) equal protection under the Fourteenth Amendment to the U.S. Constitution; and/or (B) due course of law under Article I, Section 19 of the Texas Constitution (R. II-28; SI-65).

POINT OF ERROR NO. 8

The district court violated appellant's rights not only to open access to the appellate courts guaranteed her under Section 13 of Article I of the Texas Constitution (R. II-28; SI-65).



NO. 13-88-181-CR

IN THE TEXAS COURT OF APPEALS,
THIRTEENTH SUPREME JUDICIAL DISTRICT
AT CORPUS CHRISTI, TEXAS

RITA IRIS FISHMAN, § Appeal of Cause No.
Appellant § 88-CR-87-E
 § From the 357th
VS. § District Court
 § Cameron County, Texas
 §
THE STATE OF TEXAS § Hon. R. Valdez
 § Judge Presiding

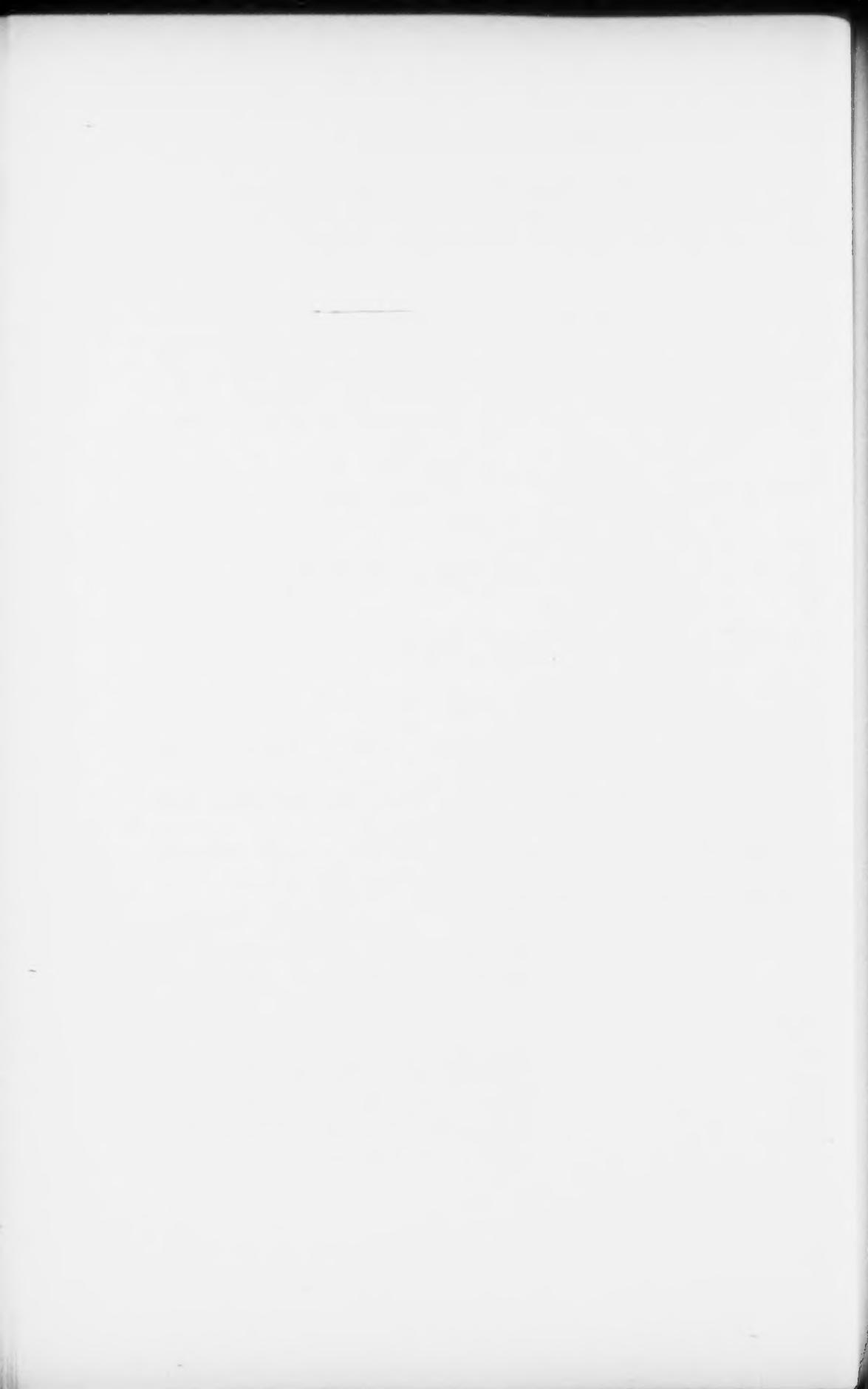
FIRST MOTION FOR REHEARING

TO THE HONORABLE COURT OF APPEALS:

NOW COMES the appellant, RITA IRIS FISHMAN, who requests the Court to reconsider the above case and to reverse the judgment and opinion which the court rendered herein on April 20, 1989.

Respectfully submitted by
Appellant's Attorney,

/s/ Joseph A. Connors III
JOSEPH A. CONNORS III
Texas Bar No. 04705400
McAllen, Texas 78502-5838
(512) 687-8217



NO. 13-88-181-CR

IN THE THIRTEENTH COURT OF APPEALS
OF TEXAS

RITA IRIS FISHMAN, § ON APPEAL
Appellant §§ FROM CAMERON
VS. THE STATE OF TEXAS §§ COUNTY, TEXAS

APPELLANT'S FIRST AMENDED OR SECOND MOTION
FOR REHEARING AND FIRST MOTION TO ABATE
APPEAL FOR TRIAL COURT HEARING PURSUANT
To Tex.R.App.P. 53(m) and (j) SINCE TO
PROHIBIT APPELLANT FROM BEING DENIED A
MEANINGFUL APPEAL, UNDERSIGNED COUNSEL
ALONG WITH A RELATIVE OF APPELLANT WILL
NOW BUY THE \$9,000 STATEMENT OF FACTS
IF APPELLANT IS NOT JUDICIALLY
DECLARED LEGALLY ENTITLED TO
SUCH A FREE RECORD BECAUSE
OF HER FINANCIAL STATUS

TO THE COURT OF APPEALS FOR THE 13TH SUPREME
JUDICIAL DISTRICT:

Rita Iris Fishman, defendant in cause no. 88-CR-87-E in the 357th District Court of Cameron County, Texas before the Honorable Rogelio Valdez, Judge Presiding, and appellant before this Court of Appeals, respectfully files in lieu of her first motion for rehearing, this first amended or



second motion for rehearing, requesting this Court to reconsider and set aside its judgment and opinion of April 20, 1989, with instructions to the district court to grant the appellant's request so that at no expense to appellant the court reporter will furnish a statement of facts of the entire trial proceedings and the district clerk will furnish the transcript in this cause.

GROUND FOR REHEARING NUMBER ONE

The 13th Court of Appeals reversibly erred in overruling appellant's first point of error, since appellant's uncontroverted affidavit of indigency, which was judicially noticed after being offered in evidence, provided such evidence of appellant's financial status as to leave no discretion for the district court under Tex.R.App.P. 53(j)(2) but to find appellant to be adequately indigent for purposes of obtaining the requested appellate record of the jury trial.



GROUND FOR REHEARING NUMBER TWO

The 13th Court of Appeals reversibly erred in holding that the record did not support the appellant's contention that the district court failed to consider the documentary evidence which previously had been offered into evidence and judicially noticed at the appellant's request.

GROUND FOR REHEARING NUMBER THREE

The 13th Court of Appeals reversibly erred in holding that the fact that the appellant had secured bond and retained counsel should be considered in determining whether the appellant was indigent.

GROUND FOR REHEARING NUMBER FOUR

The 13th Court of Appeals reversibly erred in holding that the appellant had real property which could be either sold or encumbered to secure funds to pay for the statement of facts and transcript.



GROUND FOR REHEARING NUMBER FIVE

The Court of Appeals reversibly erred in failing to find that the district court improperly considered homestead property in deciding appellant personally had the ability to pay for the statements of facts on appeal.

GROUND FOR REHEARING NUMBER SIX

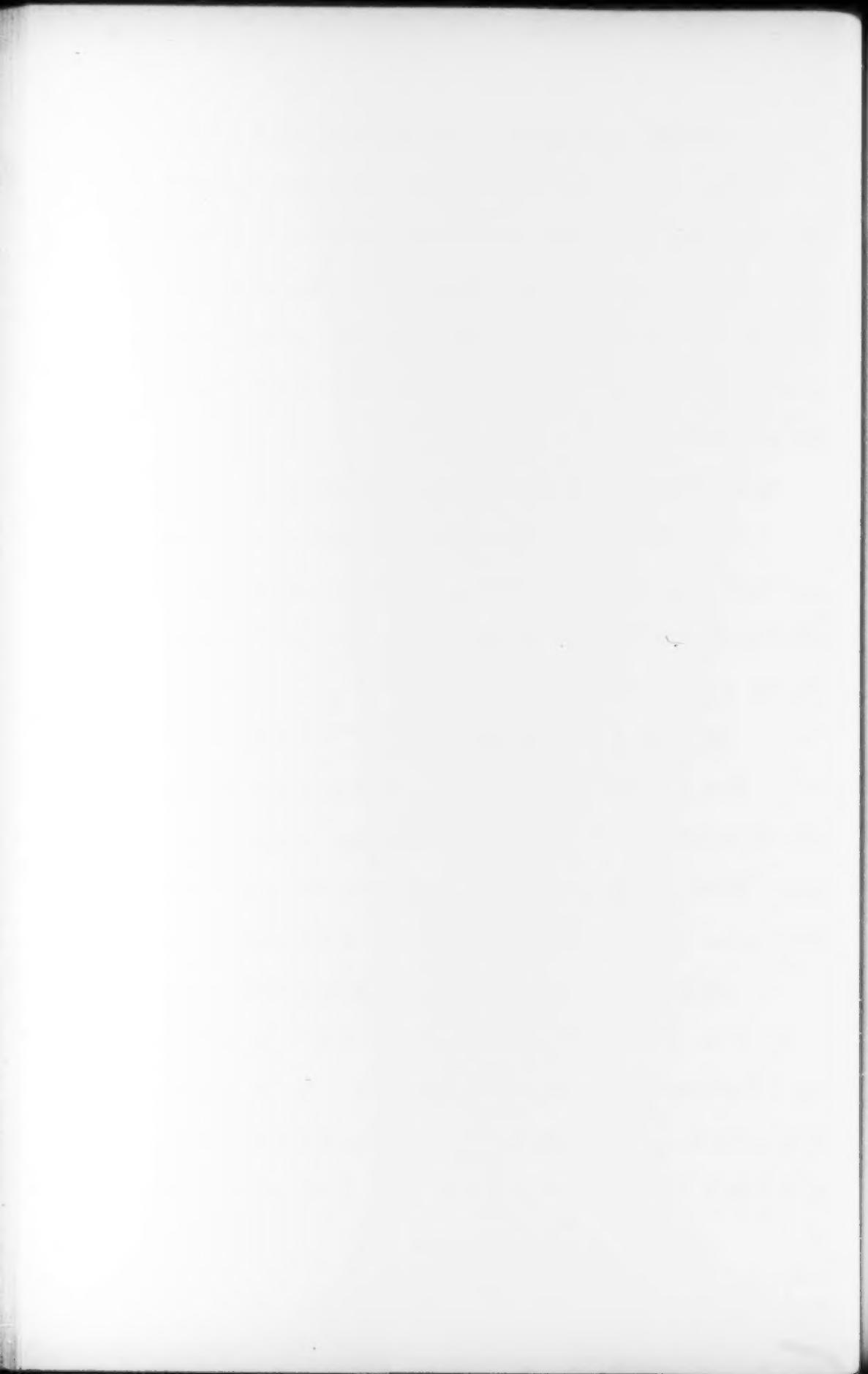
The Court of Appeals reversibly erred in failing to find that the district court did not apply the proper rule of law to the facts presented.

GROUND FOR REHEARING NUMBER SEVEN

The Court of Appeals reversibly erred in finding that on the facts of this case, appellant was required to introduce any evidence concerning her living expenses.

GROUND FOR REHEARING NUMBER EIGHT

The Court of Appeals reversibly erred in finding that on the facts of this case, appellant was required to introduce any evidence demonstrating why the 1.38 acre lot



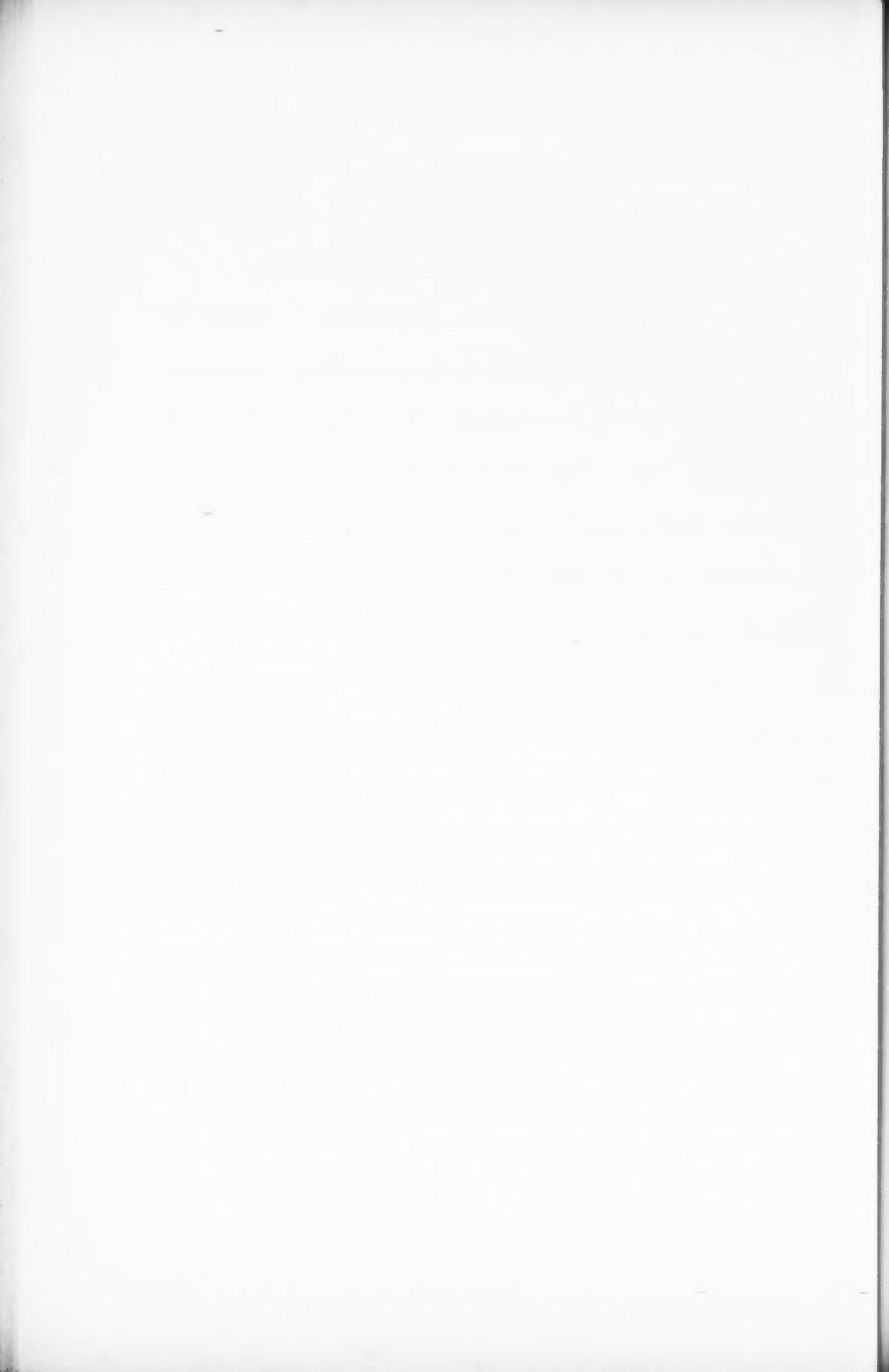
could not legally be incumbered or sold in order to provide security or pay for the statement of facts and transcript.

GROUND FOR REHEARING NUMBER NINE

Contrary to the district court's implied negative finding concerning present ability to give security to obtain her own transcript (R. II-28), the 13th Court of Appeals reversibly erred in agreeing with the State's contention, which was untimely raised for the first time on appeal (see R. II-25-29), that appellant did not prove that she was unable to pay for a portion of the record, or alternatively provide security for a portion of the same.

GROUND FOR REHEARING NUMBER TEN

The judgment and opinion of the 13th Court of Appeals deprives appellant of her statutory right to a meaningful merits appeal of the conviction in this case, in violation of this appellant's right to due



course of law under Article I, Section 19 of the Texas Constitution.

GROUND FOR REHEARING NUMBER ELEVEN

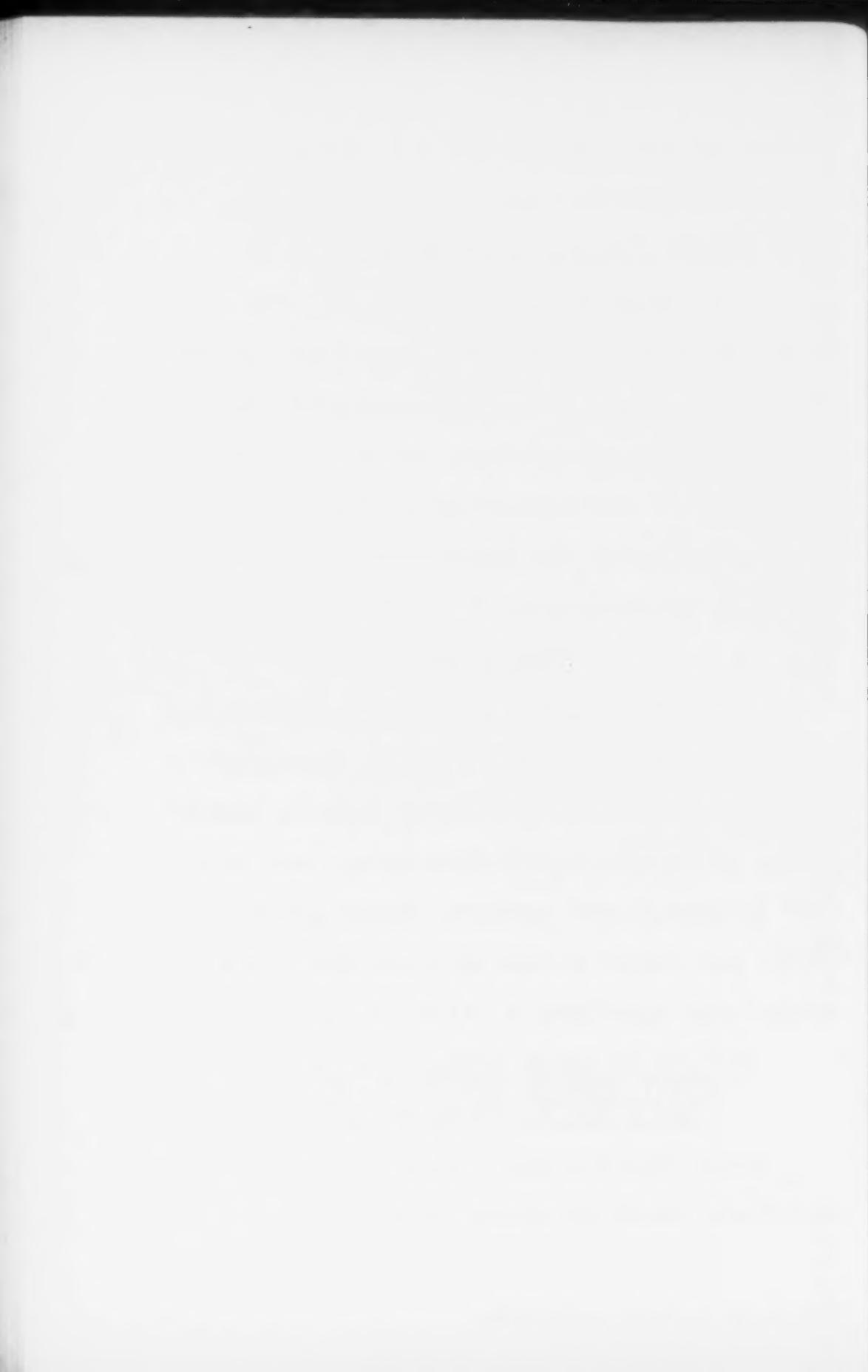
The judgment and opinion of the 13th Court of Appeals deprives appellant of her statutory right to a meaningful merits appeal of the conviction in this case, in violation of this appellant's right to equal protection under the Fourteenth Amendment to the U.S. Constitution. * * * *

CONCLUSION

For the reasons stated above and for the reasons contained in the appellant's original brief, this Court of Appeals should grant this Motion for Rehearing, set aside its judgment and opinion dated April 20, 1989, and enter a new opinion and judgment sustaining appellant's rehearing grounds.

MOTION TO ABATE APPEAL FOR TRIAL
COURT HEARING NOW PURSUANT TO
Tex.R.App.P. 53(m) and (j)

Rita Iris Fishman, appellant moves the appellate court to abate this appeal and to

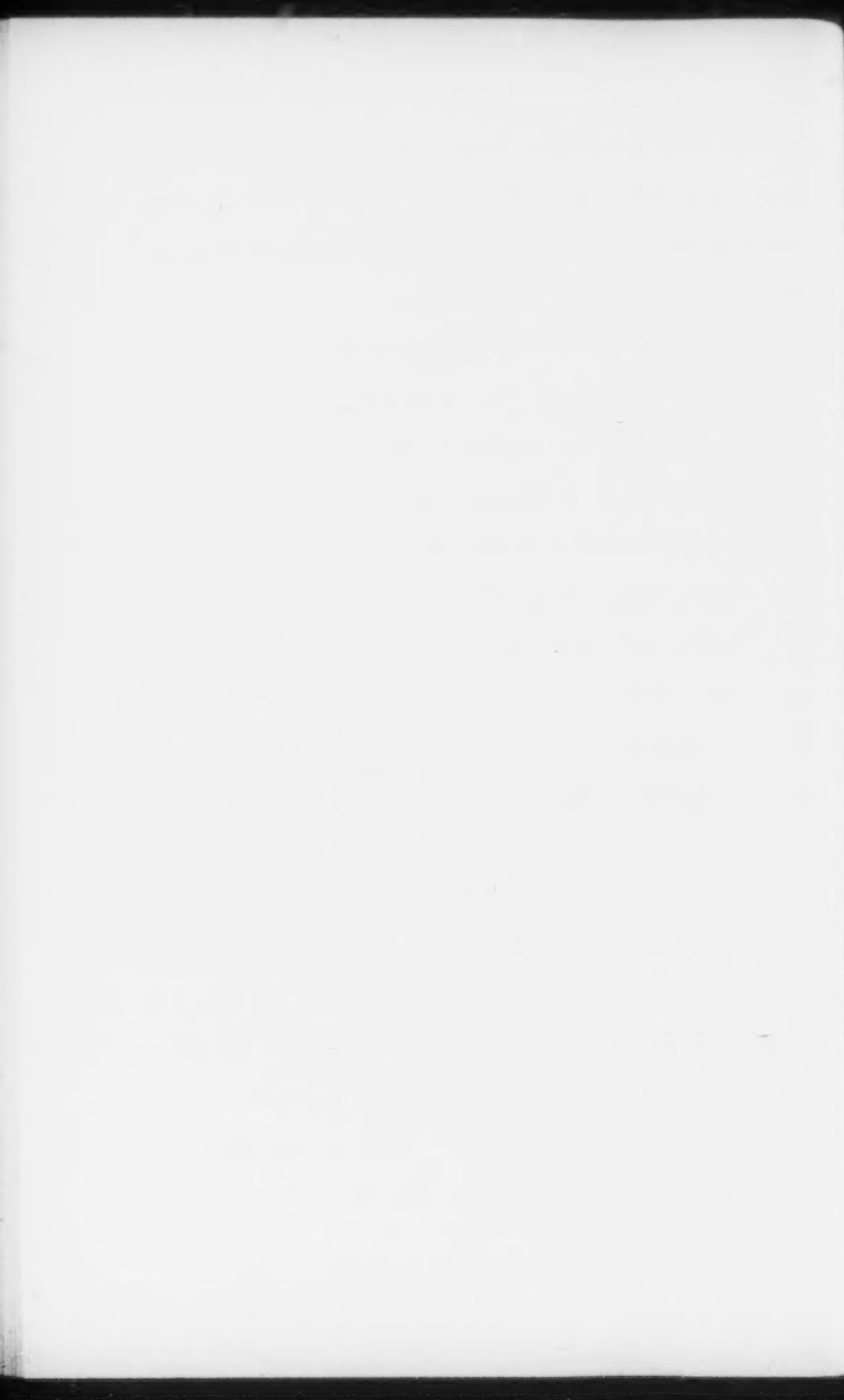


order the district court to hold a hearing pursuant to Texas R.App.P. 53(m) and (j) to determine at the present time (nearly a year since the August 4, 1988),

- A. whether this appellant has now been deprived of a statement of facts because of ineffective counsel or for any other reason; and/or
- B. whether this appellant is now unable to pay for or give security for all or part of the court reporter's statement of facts and the district clerk's transcript.

ACKNOWLEDGEMENT BY ATTORNEY CONNORS

Attorney Joseph A. Connors III is having ethical pangs of conscience. Connors has been paid to prepare a merits appellate brief but has not been provided a record with which to prepare appellant's merits appeal. During oral argument in this case, presiding judge Utter inquired in effect if attorney Connors were willing to buy the



appellate record. Now after receiving the 13th Court's opinion dated April 20, 1989, attorney Connors has determined that if the district court legally denied such merits record to appellant, then appellant must have one even if it means attorney Connors will have to sacrifice part of his appellate attorney's fees. On May 17, 1989 about 5:30 p.m. CST, attorney Connors spoke by phone to appellant's uncle in New York. That uncle said he will obtain the money to now buy the appellate record if the appellate court's opinion remains unchanged. Thus attorney Connors requests the 13th Court to consider the foregoing first amended or second motion for rehearing. If the district court's judgment is still to be affirmed, attorney Connors on behalf of appellant requests time from the 13th Court so the court reporter can be paid the \$9,000.00 by attorney Connors and appellant's New York uncle (two persons not legally obligated to so act) so



that now at this late date, appellant can properly and fully exercise her statutory right to appellate review of the merits of her jury trial.

Respectfully submitted by
Appellant's Attorneys,

/s/ Joseph A. Connors III
JOSEPH A. CONNORS III
Texas Bar No. 04705400
McAllen, Texas 78502-5838
(512) 687-8217

THOMAS SULLIVAN
Texas Bar No. 19491800
1185 F.M. 802, Suite 4
Brownsville, Texas 78521
(512) 544-4500

WILLIAM E. OWEN
OF COUNSEL
Texas Bar No. 15375150
221 N. 8th Street
Edinburg, Texas 78539
(512) 381-6222



THE STATE OF TEXAS §

COUNTY OF HIDALGO §

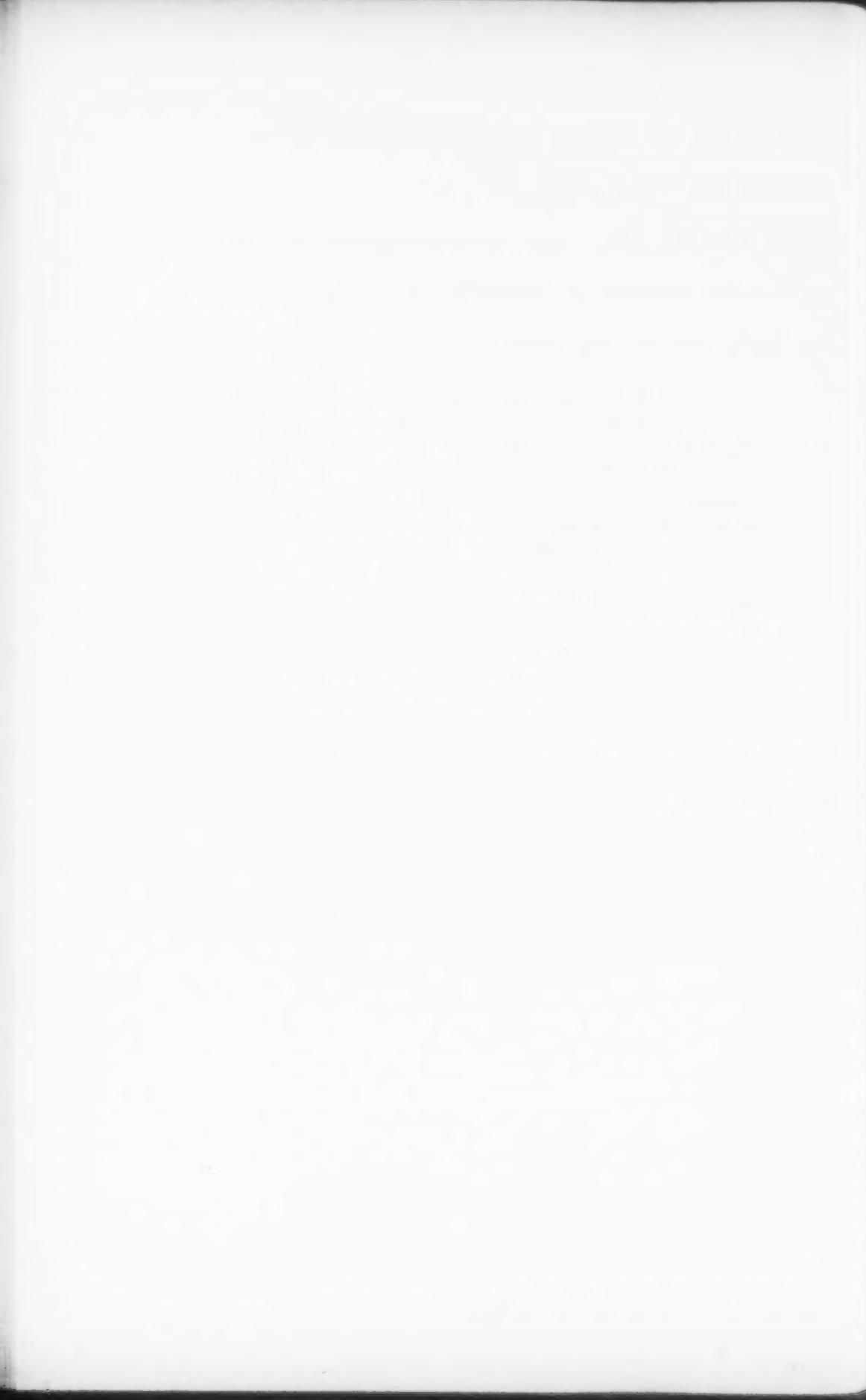
BEFORE ME, the undersigned authority,
appeared JOSEPH A. CONNORS III, who being by
me duly sworn did say:

"My name is Joseph A. Connors
III, and I am one of the
appellant's counsel in the above
styled and numbered cause. I have
read all of the foregoing
Acknowledgement by attorney
Connors. I hereby swear that the
facts contained therein are true
and correct."

/s/ Joseph A. Connors III
JOSEPH A. CONNORS III

SWORN TO AND SUBSCRIBED before me on
May 18, 1989.

/s/ Rosalba Garza
Notary Public In And For
The State of Texas



Court of Appeals
Thirteenth Supreme Judicial District
TENTH FLOOR
NUECES COUNTY COURTHOUSE
CORPUS CHRISTI, TEXAS 78401

June 8, 1989

Thomas Sullivan
Downey & Sullivan
Attorneys at Law
1185 FM 802, Suite 4
Brownsville, Texas 78521

Joseph A. Connors, III
Attorney at Law
P.O. Box 5838
McAllen, Texas 78502

Mr. William E. Owen
Attorney at Law
221 N. 8th Street
Edinburg, Texas 78539

Ben Euresti, Jr.
County Criminal District Attorney
974 E. Harrison
Brownsville, Texas 78520

RE: CASE NO. 13-88-00181-CR
TRIAL COURT CAUSE NO. 88-CR-87-E

STYLE: Fishman Rita Iris
V: The State of Texas

The appellant's motion for addition of co-counsel was GRANTED by this Court on this date, and the Honorable William E. Owen has been added as co-counsel for appellant in this cause.

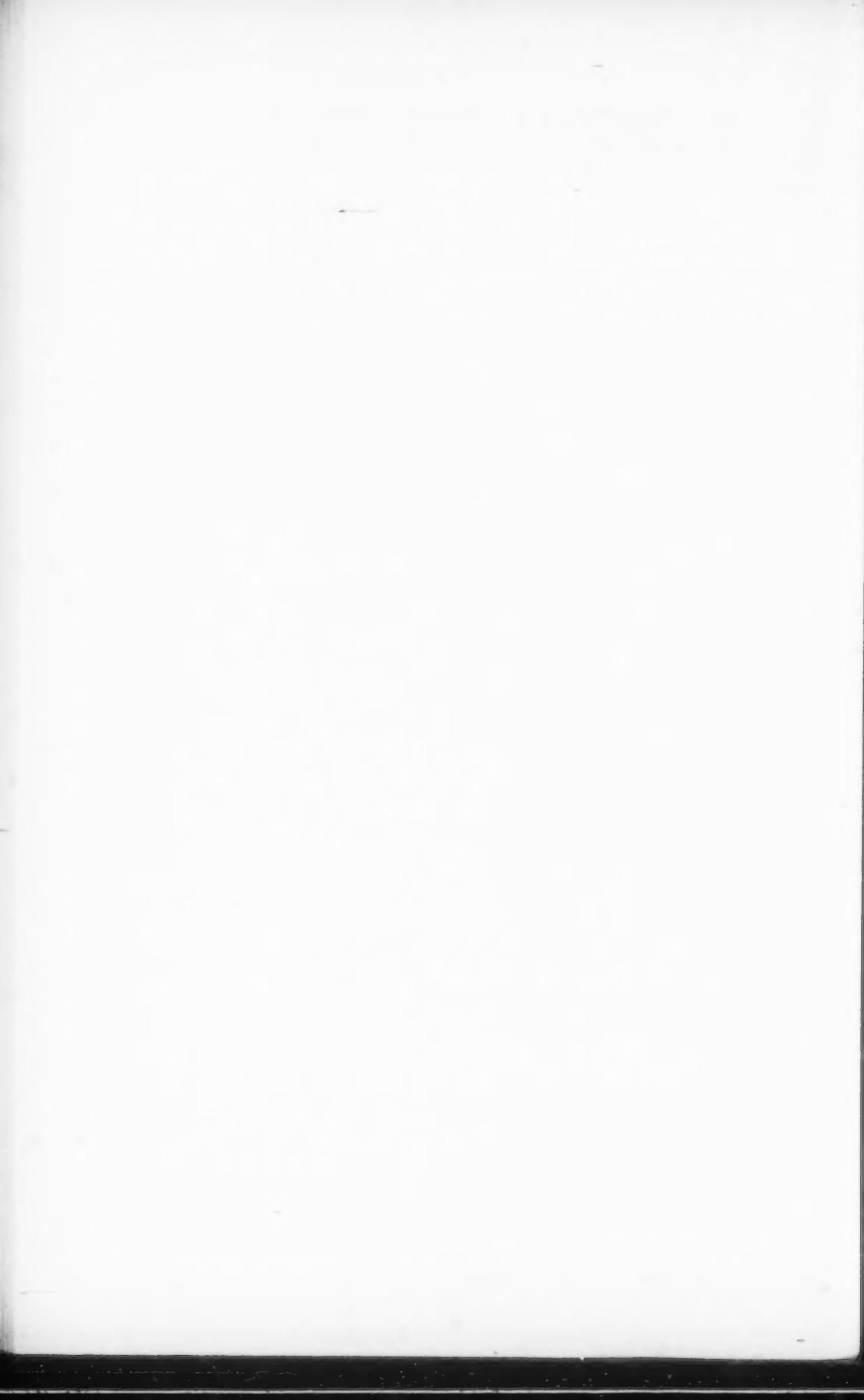


The appellant's motion for leave to file amended motion for rehearing was also GRANTED by this Court on this date. The amended motion for rehearing has been ordered filed as of May 19, 1989, the date of receipt. The appellant's amended motion for rehearing was OVERRULED by this Court on this date. The appellant's motion to abate was DISMISSED by this Court on this date.

Respectfully yours,

BETH A. GRAY, Clerk

By /s/ Cathy Wilborn
Deputy



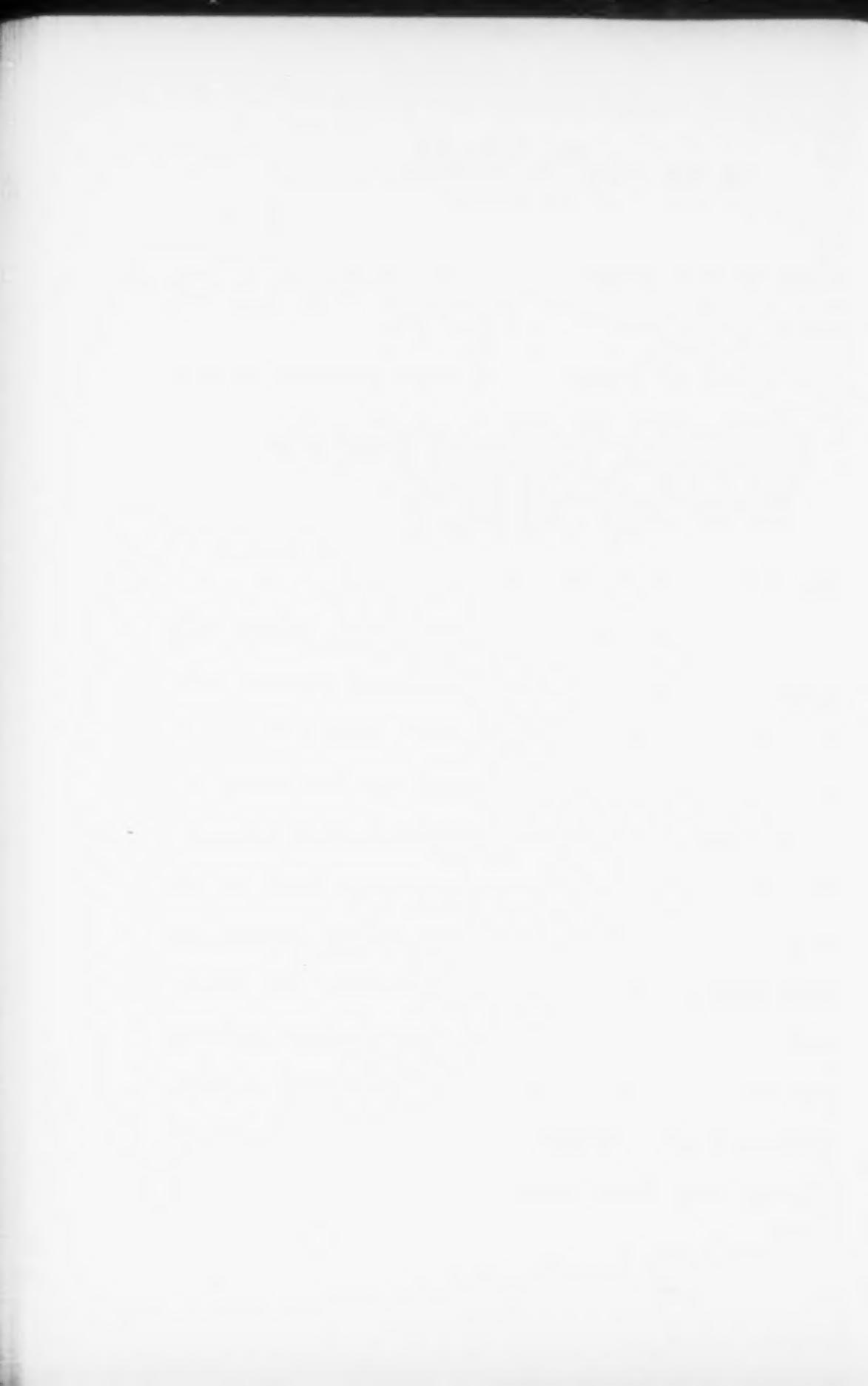
No. 1085-89
IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

RITA IRIS FISHMAN \$ ON APPEAL
VS. \$
THE STATE OF TEXAS \$ FROM CAMERON COUNTY

APPELLANT'S MOTIONS TO ABATE APPEAL AND
TO SUPPLEMENT INFORMATION CONCERNING BOTH
HER P.D.R. AND HER CURRENT EXPENSES AND
CHANGED CONDITIONS NOW THAT ALL INCOME
HAS BEEN TERMINATED

TO THE COURT OF CRIMINAL APPEALS:

RITA IRIS FISHMAN, appellant moves the
court to abate the direct appeal process and
to remand the cause to the district court
for another hearing pursuant to Tex.R.App.P.
53(m) and (j) since conditions have changed
so greatly since the evidentiary hearing on
August 8, 1988. Appellant also moves to
supplement the information before the court
concerning her petition for discretionary
review (P.D.R.) and her current living
expenses and changed conditions now that all
income has been terminated and her current



living expenses are being paid by securing loans. In support of these motions, appellant has attached her affidavit dated September 12, 1989. Said affidavit is incorporated herein for all purposes.

ARGUMENT

The last hearing on this matter was conducted in the district court on August 4, 1988 and appellant's financial circumstances have greatly deteriorated since then.

Respectfully submitted by
Appellant's Attorneys,

/s/ Joseph A. Connors III
JOSEPH A. CONNORS III
Texas Bar No. 04705400
McAllen, Texas 78502-5838
(512) 687-8217

THOMAS SULLIVAN
Texas Bar No. 10491800
1185 FM 802, Suite 4
Brownsville, Texas 78520
(512) 544-4500

WILLIAM E. OWEN
Texas Bar No. 15375150
221 N. 8th Street
Edinburg, Texas 78539
(512) 381-6222



CAUSE NO. 1085-89
IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

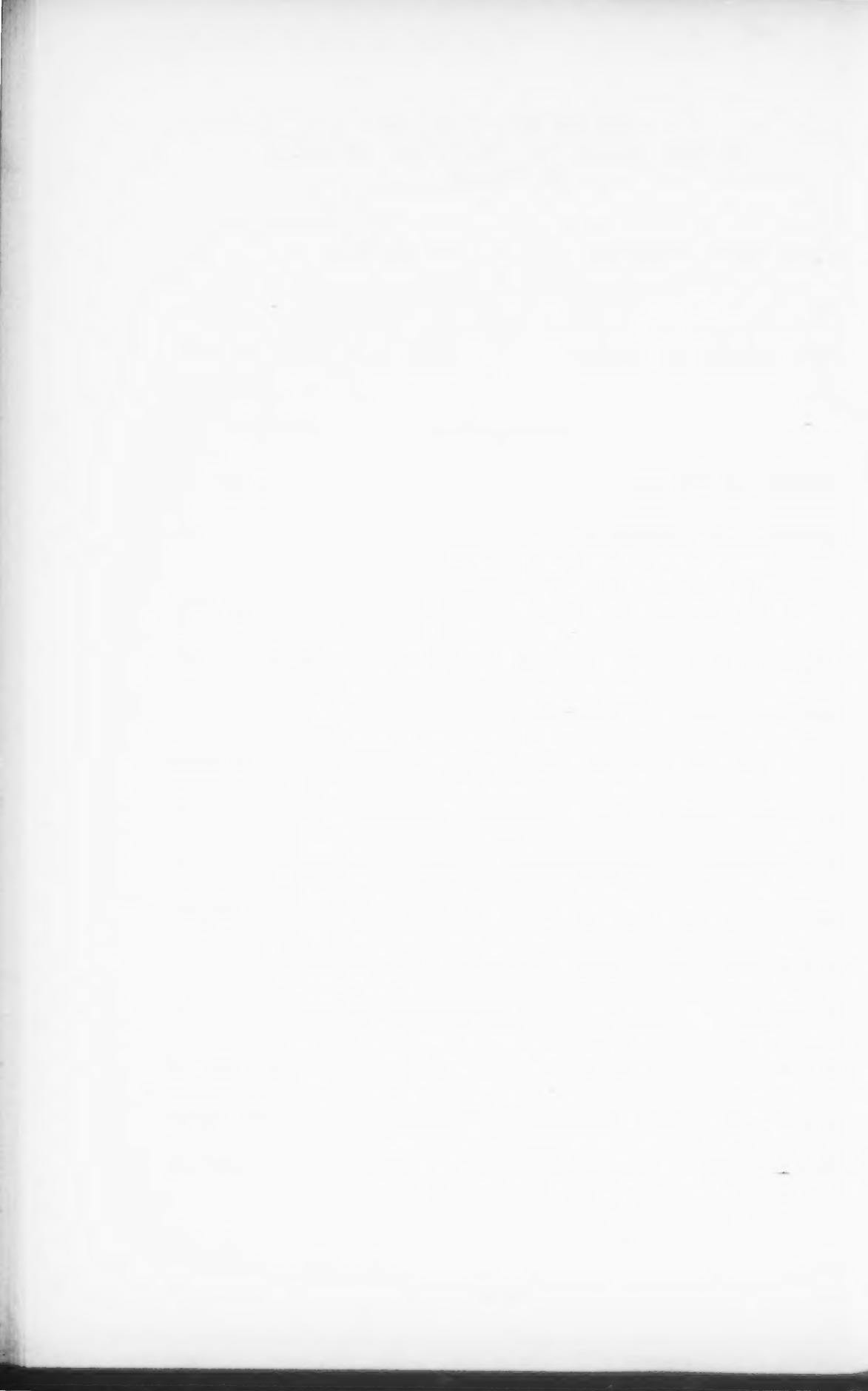
RITA IRIS FISHMAN * ON APPEAL
VS. *
THE STATE OF TEXAS * FROM CAMERON COUNTY

AFFIDAVIT

STATE OF TEXAS
COUNTY OF CAMERON

My name is Rita Iris Fishman, I am 41 years old, of sound mind and capable of making this affidavit.

On or about July 10, 1989, I received notice that the United States Office of Personnel Management had stopped all payments to me as the widow of Sam Fishman pursuant to the Federal Employees Civil Service Annuity. Attached hereto and Incorporated herein for all purposes is a copy of the notice I received from the financial institution, Valley Federal



Employees Credit Union, where the annuity was directly deposited.

This has been my only source of income. I now have no income at all in any form.

When I contacted the manager of the Valley Federal Employees Union, I was advised that my daughter was also declared ineligible and that payment of her annuity was also stopped. I immediately notified the Guardian of my daughter's estate, the Hon. James Odabashian, Attorney at law. To this date, neither he nor my daughter has received any annuity payment since May, 1989.

I now have no income.

I have monthly expenses in the amount of \$1374.73. They are as follows:

House Payment (including insurance and taxes)	\$ 542.00
Groceries	250.00
Car Insurance (\$234. every 6 mos.)	39.00
Car repairs and maintenance	100.00
Clothing for Amy	80.00
Life insurance for Amy	8.73
Electric Bill	150.00



Telephone	20.00
Water	13.00
Medical and Dental bills for Amy	20.00
Health Insurance	102.00
Home Repair	50.00

Since the annuity has not been paid, I have been borrowing money from my parents to live.

I have been looking for employment but I still have not been able to find one. I go to the Texas Employment Commission once a week to check on jobs. I have no marketable skills, and have not worked outside the home since before I was married in 1975. Most minimum wage jobs for which I may be qualified, require the applicant to be bilingual and I am not. I have also discovered employers are reluctant to hire me because of all my legal problems. My job search is further complicated by my lack of day care for my daughter.

Date 9/12/89

/s/ Rita Iris Fishman
Rita Iris Fishman



ACKNOWLEDGEMENT

THE STATE OF TEXAS : :

COUNTY OF CAMERON : :

BEFORE ME, a Notary Public, on this day personally appeared RITA IRIS FISHMAN, known to me to be the person whose name is subscribed to the foregoing instrument

GIVEN UNDER MY HAND AND SEAL OF OFFICE
this 12th day of September, 1989.

/s/ Rosalinda A. Sullivan
Notary Public in and for
Cameron County, Texas

My commission expires: 5-18-92



U.S. OPM
1900 E STREET NW
WASHINGTON, DC 20415 30AM

WESTERN UNION MAILGRAM

1-025201U150008 05/30/89 ICS WA16614
00418 MLTN VA 05/30/89 JN29933

VALLEY FED EMPL FCU
PO BX 3862
BROWNSVILLE TX 78520

PLEASE RETURN NEXT TREASURY DIRECT DEPOSIT
PAYMENT RECEIVED FOR THIS ACCOUNT:

CO NAME: US TREASURY 307

CO ID: 3071036184

CO DATE: FIRST BUSINESS DAY OF JUNE

ACCOUNT NUMBER: C3362-14-01

PAYEE: RITA IRIS FISHMAN

AMOUNT: 521.00

OPM CLAIM NUMBER: CS F1369986W

REASON: INELIGIBLE

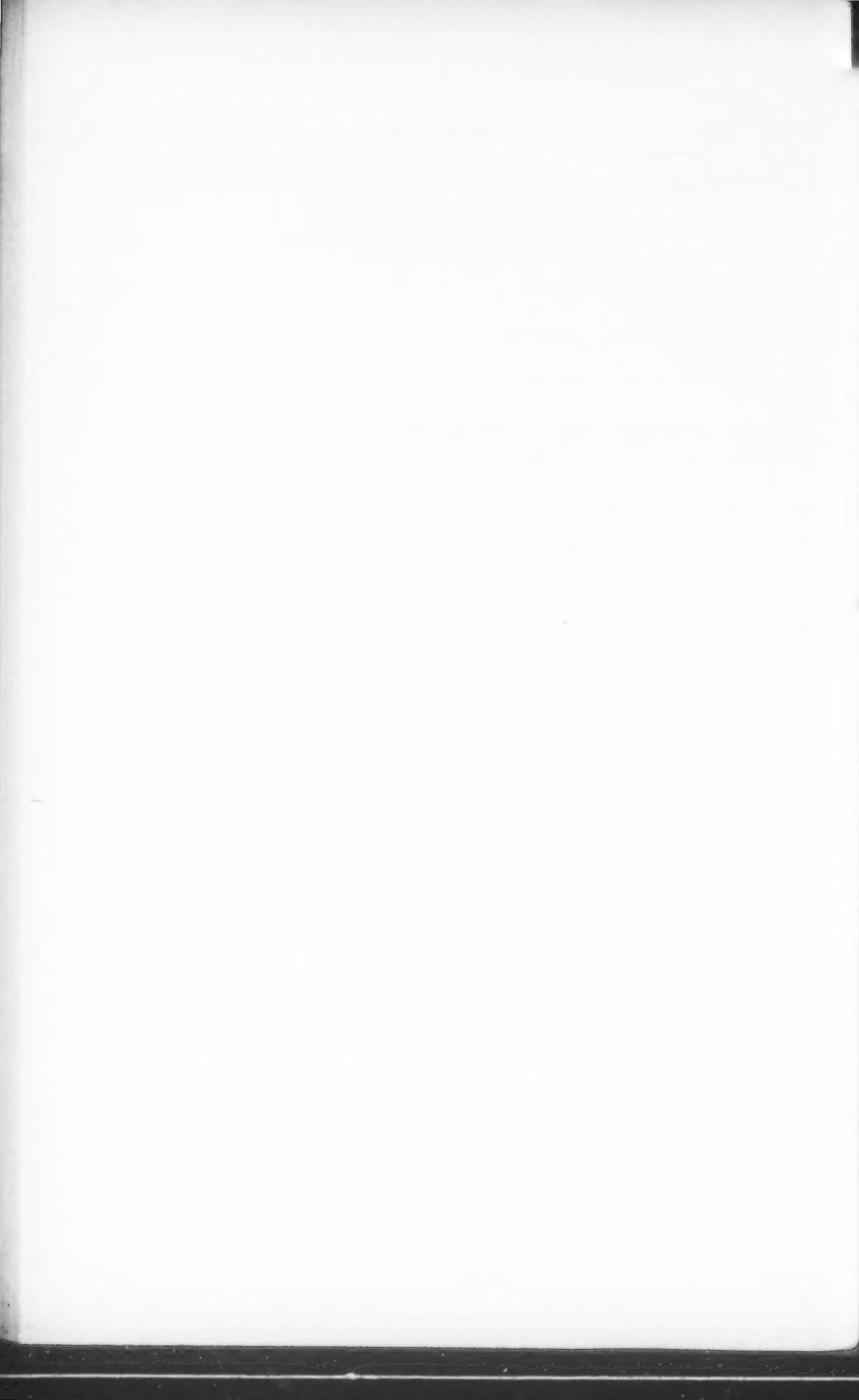
IMPORTANT: DO NOT RETURN PAYMENT BY
CHECK-USE RETURN ITEM OR TAPE.
SEE GREEN BOOK.

DELAY WILL RESULT IN ISSUANCE OF RECLAMATION
NOTICE. IF NOTICE IS RECEIVED FOR THIS
PAYMENT AFTER REPAYING, INDICATE PREVIOUS
REPAYMENT AND REMIT ONLY BALANCE DUE.

ACCOUNTING BRANCH
RETIREMENT AND INSURANCE GROUP
OFFICE OF PERSONNEL MANAGEMENT

10:20 EST

MGMCOMP



No. 1085-89

IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

RITA IRIS FISHMAN § ON APPEAL
VS. §
 §
THE STATE OF TEXAS § FROM CAMERON COUNTY

APPELLANT'S PETITION FOR DISCRETIONARY
REVIEW OF THE JUDGMENT, OPINION AND
RULINGS IN CAUSE NO. 13-88-181-CR

[Note: In that P.D.R., the appellant's nineteen grounds of error read as follows: see next page]



GROUND FOR REVIEW NO. 1

The 13th Court of Appeals reversibly erred in overruling appellant's motion for rehearing's ground number five, which read:

The Court of Appeals reversibly erred in failing to find that the district court improperly considered homestead property in deciding appellant personally had the ability to pay for the statements of facts on appeal.

GROUND FOR REVIEW NO. 2

The 13th Court of Appeals reversibly erred in overruling appellant's motion for rehearing's ground number four, which read:

The 13th Court of Appeals reversibly erred in holding that the appellant had real property which could be either sold or encumbered to secure funds to pay for the statement of facts and transcript.

GROUND FOR REVIEW NO. 3

The 13th Court of Appeals reversibly erred in overruling appellant's motion for rehearing's ground number eight, which read:

The Court of Appeals reversibly erred in finding that on the facts of this case, appellant was required to introduce any evidence demonstrating why the 1.38 acre lot could not legally be encumbered (sic) or sold in order to provide security or pay for the statement of facts and transcript.



GROUND FOR REVIEW NO. 4

The 13th Court of Appeals reversibly erred in overruling appellant's motion for rehearing's ground number one, which read:

The 13th Court of Appeals reversibly erred in overruling appellant's first point of error, since appellant's uncontroverted affidavit of indigency, which was judicially noticed after being offered in evidence, provided such evidence of appellant's financial status as to leave no discretion for the district court under Tex.R.App.P. 53(j)(2) but to find appellant to be adequately indigent for purposes of obtaining the requested appellate record of the jury trial.

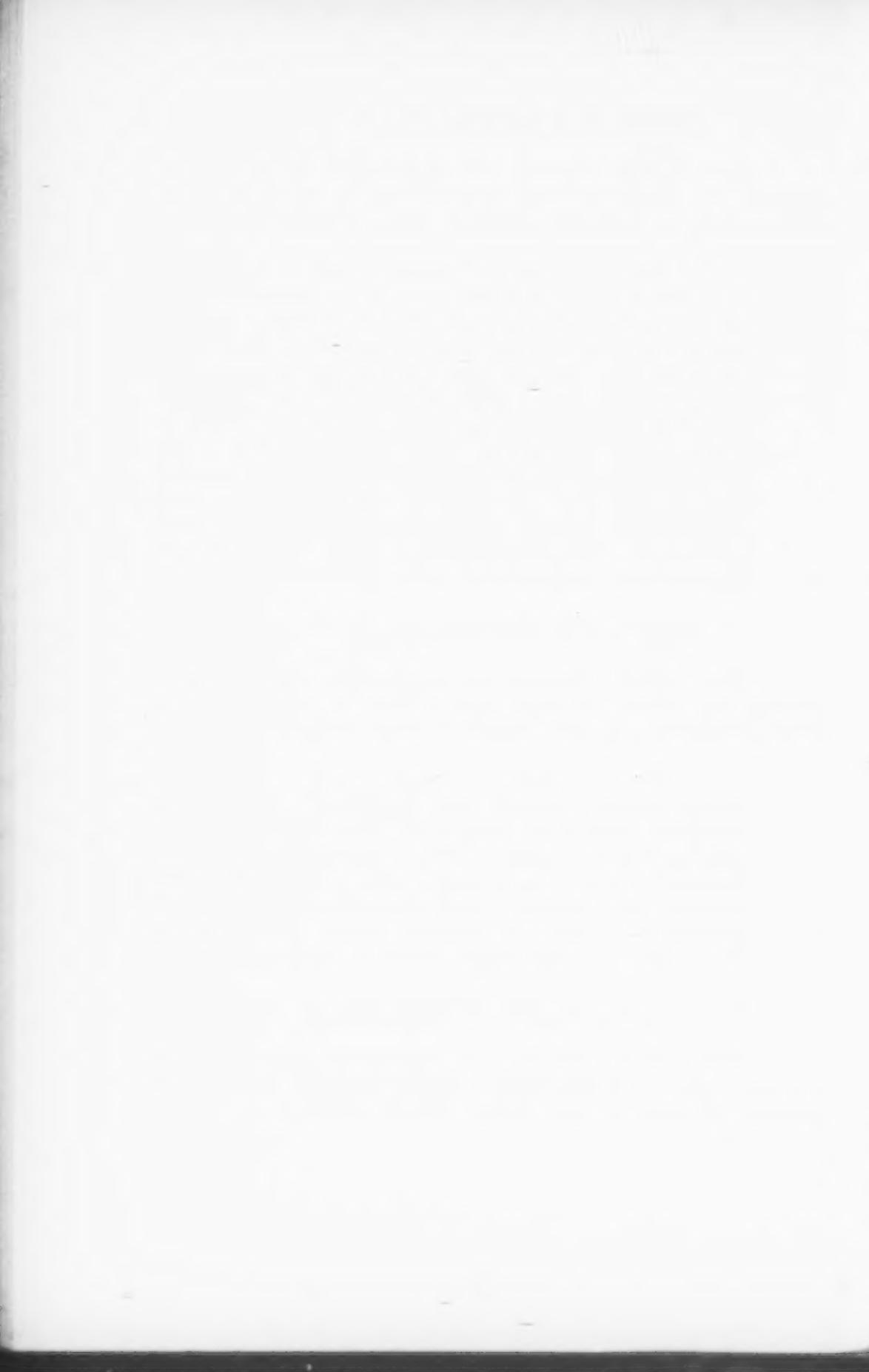
GROUND FOR REVIEW NO. 5

The 13th Court of Appeals reversibly erred in overruling appellant's motion for rehearing's ground number two, which read:

The 13th Court of Appeals reversibly erred in holding that the record did not support the appellant's contention that the district court failed to consider the documentary evidence which previously had been offered into evidence and judicially noticed at the appellant's request.

GROUND FOR REVIEW NO. 6

The 13th Court of Appeals reversibly erred in overruling appellant's brief's point of error no. two, which read:



In determining the question of appellant's indigence the district court abused its discretion in limiting its consideration to only oral "evidence that I have heard" (R. II-28), since the court failed to consider the documentary evidence (R. SI-10, 20-49; SSI 2-3), which previously had been offered into evidence and judicially noticed (received in evidence) at appellant's request (R. II-2-4).

GROUND FOR REVIEW NO. 7

The 13th Court of Appeals reversibly erred in overruling appellant's motion for rehearing's ground number six, which read:

The Court of Appeals reversibly erred in failing to find that the district court did not apply the proper rule of law to the facts presented.

GROUND FOR REVIEW NO. 8

The 13th Court of Appeals reversibly erred in overruling appellant's brief's point of error no. three, which read:

On August 4, 1988, the district court abused its discretion in finding that appellant "is not indigent" (R. II-28, lines 17-18; SI-65).

GROUND FOR REVIEW NO. 9

The 13th Court of Appeals reversibly erred in overruling appellant's brief's point of error no. four, which read:



The district court abused its discretion in finding that appellant has at her disposal sufficient sums of money to obtain her own transcript (R. II-28, lines 18-20).

GROUND FOR REVIEW NO. 10

The 13th Court of Appeals reversibly erred in overruling appellant's motion for rehearing's ground number seven, which read:

The Court of Appeals reversibly erred in finding that on the facts of this case, appellant was required to introduce any evidence concerning her living expenses.

GROUND FOR REVIEW NO. 11

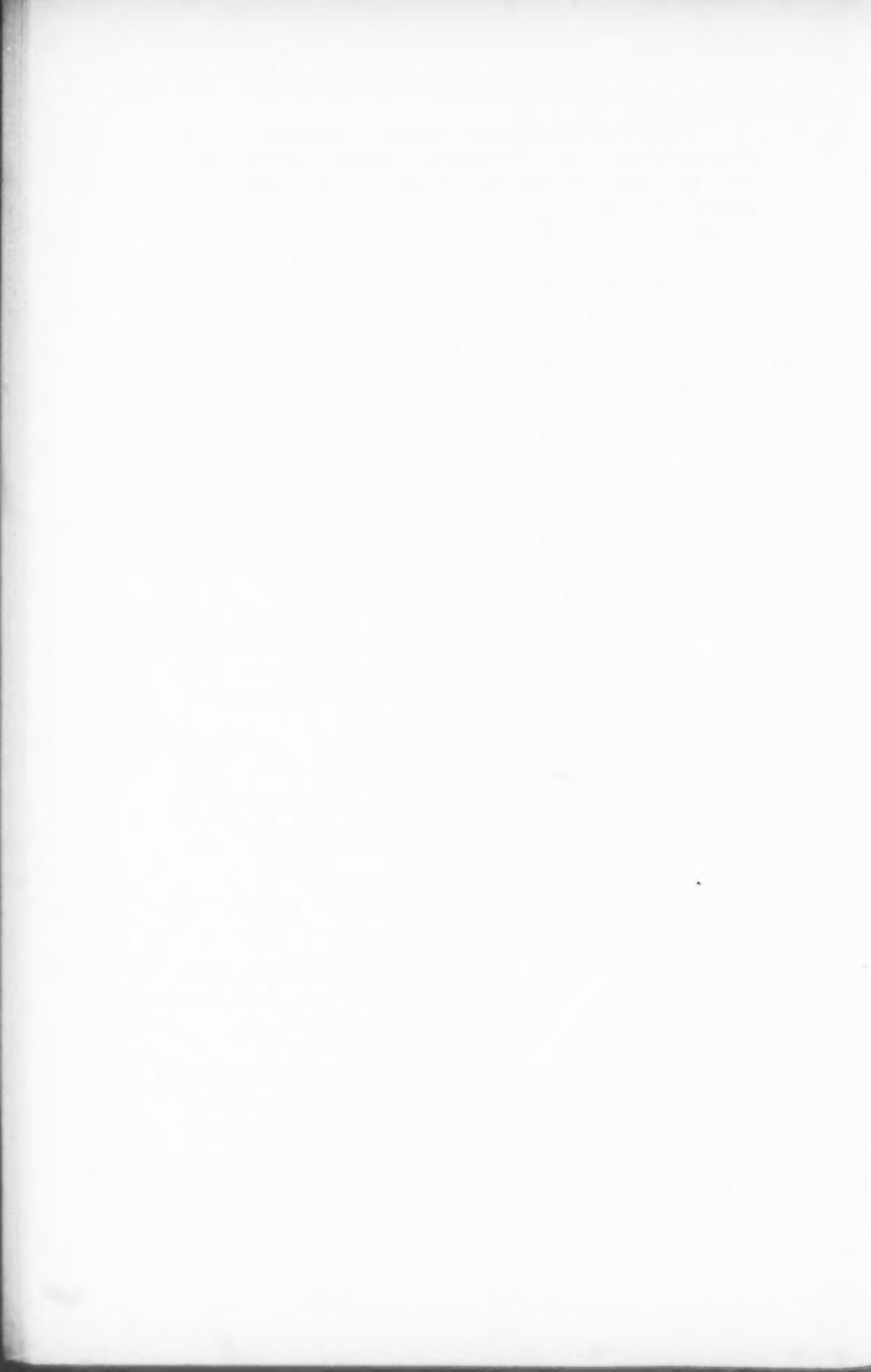
The 13th Court of Appeals reversibly erred in overruling appellant's motion for rehearing's ground number three, which read:

The 13th Court of Appeals reversibly erred in holding that the fact that the appellant had secured bond and retained counsel should be considered in determining whether the appellant was indigent.

GROUND FOR REVIEW NO. 12

The 13th Court of Appeals reversibly erred in overruling appellant's brief's point of error no. five, which read:

In determining the question of appellant's indigence for purposes of obtaining a record on appeal, the district court abused its discretion in considering as relevant factors that appellant not only had retained counsel



at the prior (motion for new trial) hearing but also is now being represented by attorneys Joseph Connors and Thomas Sullivan on August 4, 1988, (R. II-28-29, line 22 to line 3).

GROUND FOR REVIEW NO. 13

The 13th Court of Appeals reversibly erred in overruling appellant's brief's point of error no. six, which read:

The prosecutor committed constitutional misconduct in opposing this indigent appellant's prima facie case with nothing but lawyer talk (R. II-23-29).

GROUND FOR REVIEW NO. 14

The 13th Court of Appeals reversibly erred in overruling appellant's motion for rehearing ground no. nine, which read:

Contrary to the district court's implied negative finding concerning present ability to give security to obtain her own transcript (R. II-28), the 13th Court of Appeals reversibly erred in agreeing with the State's contention, which was untimely raised for the first time on appeal (see R. II-25-29), that appellant did not prove that she was unable to pay for a portion of the record, or alternatively provide security for a portion of the same.

GROUND FOR REVIEW NO. 15

On August 31, 1988, the 13th Court of Appeals reversibly erred in denying appellant's 1988 motion to abate appeal.



GROUND FOR REVIEW NO. 16

On June 8, 1989, the 13th Court of Appeals reversibly erred in dismissing appellant's 1989 MOTION TO ABATE APPEAL FOR TRIAL COURT HEARING PURSUANT TO Tex.R.App.P. 53(m) and (j) SINCE TO PROHIBIT APPELLANT FROM BEING DENIED A MEANINGFUL APPEAL, UNDERSIGNED COUNSEL ALONG WITH A RELATIVE OF APPELLANT WILL NOW BUY THE \$9,000 STATEMENT OF FACTS IF APPELLANT IS NOT JUDICIALLY DECLARED LEGALLY ENTITLED TO SUCH A FREE RECORD BECAUSE OF HER FINANCIAL STATUS.

GROUND FOR REVIEW NO. 17

The 13th Court of Appeals reversibly erred in overruling appellant's brief's point of error no. eight, which read:

The district court violated appellant's rights not only to open access to the appellate courts guaranteed her under Section 13 of Article I of the Texas Constitution (R. II-28; SI-65).

GROUND FOR REVIEW NO. 18

The 13th Court of Appeals reversibly erred in overruling appellant's motion for rehearing's ground number ten, which read:

The judgment and opinion of the 13th Court of Appeals deprives appellant of her statutory right to a meaningful merits appeal of the conviction in this case, in violation of this appellant's right to due course of law under Article I, Section 19 of the Texas Constitution.



GROUND FOR REVIEW NO. 19

The 13th Court of Appeals reversibly erred in overruling appellant's motion for rehearing's ground number eleven, which read:

The judgment and opinion of the 13th Court of Appeals deprives appellant of her statutory right to a meaningful merits appeal of the conviction in this case, in violation of this appellant's right to equal protection under the Fourteenth Amendment to the U.S. Constitution.



No. 1085-89

IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

RITA IRIS FISHMAN § ON APPEAL
VS. §
 §
THE STATE OF TEXAS § FROM CAMERON COUNTY

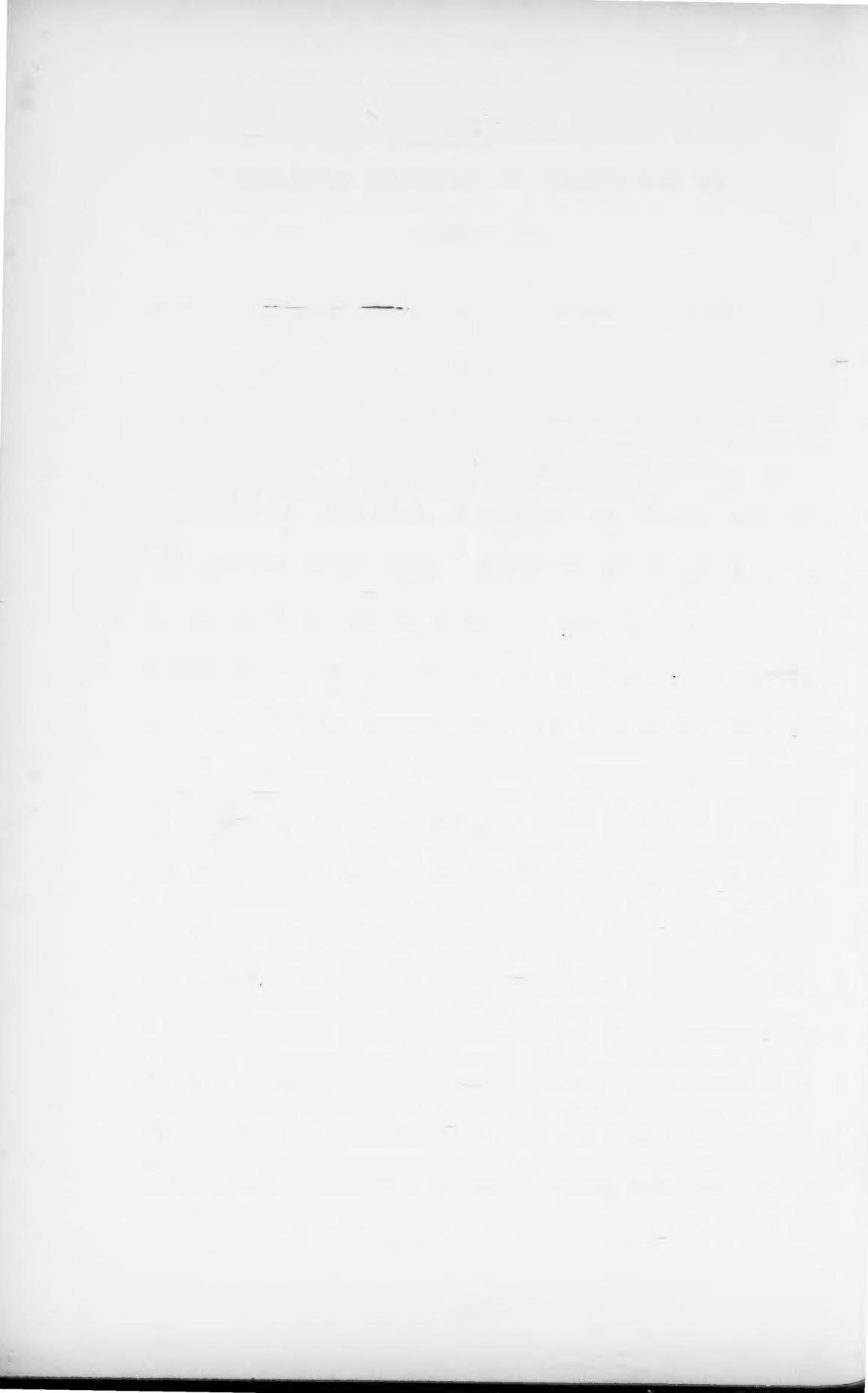
REHEARING MOTION

TO THE COURT OF CRIMINAL APPEALS:

RITA IRIS FISHMAN, appellant moves for rehearing of the Court's order refusing to grant appellant's petition for discretionary review (p.d.r.) in the above cause for the following reasons.

FACTS

Offered into evidence and judicially noticed (received in evidence) at appellant's request (R. II-2-4) was her affidavit of indigency and her request therein for a free record on appeal. With that affidavit in evidence, appellant believes she proved her financial status for



purposes of obtaining a free record under applicable federal and state law. See Tex.R.App. 53(j)(2). That affidavit read (R. SI-10):

BEFORE ME, the undersigned authority, personally appeared the above Defendant, who being by me duly sworn on oath said:

"My name is RITA IRIS FISHMAN and I am the Defendant in the above styled and numbered cause. On April 21, 1988, the judgment and imposition of sentence was entered against me in this cause. I have given Notice of Appeal to the Court of Appeals for the Thirteenth Supreme Judicial District of Texas, sitting in Corpus Christi, Texas. Other than my personal possessions and several other assets, having a total value of much less than \$9,000, and my undivided interest in one-half of our residence. I am indigent and live on a very limited income. After normal living expenses are provided for, I have insufficient money, property or assets of any kind available to pay for or give security in order to pay for the Statement of Facts or Transcript in this cause. I have been informed that the trial court reporter estimates that she will need \$9,000 to pay the expense of preparing the statement of facts in the above case. I am unable to



pay the reporter that \$9,000. I hereby request that the Court order the court reporter to furnish a Statement of Facts of the entire trial proceedings at no expense to me and to further order the Clerk to furnish the Transcript in this cause at no expense to me."

/s/ Rita Iris Fishman
AFFIANT

SWORN TO AND SUBSCRIBED before me, this the 23rd day of June, 1988.

/s/ Emma Garcia
Notary Public In and For
The State of Texas

Based on that affidavit, appellant unequivocally proved in the district court that appellant lives on such a very limited income and is indigent other than her personal possessions and several other assets, having a total value of much less than \$9,000.00, and her undivided interest in one-half of her residence, and after normal living expenses are provided for, she has insufficient money, property or assets



of any kind available to pay for or give security in order to pay for the Statement of Facts and Transcript in this cause. There was no evidence before the district court to discredit any of those affidavit facts. If, as and when the State discovers any false representations in appellant's affidavit, the State's remedy is not a finding of non-indigency but a perjury-indictment. Of course a residence sets on land, whether the land be composed of one or more urban lots, it can still be, and is herein, homestead.

VERIFIED WEIRD FACTS NOT OF RECORD

No where in the record is there evidence that appellant personally paid the cost of her pre-trial or appeal bail bonds or the cost of attorneys' fees for trial or appellate work. In fact appellant personally received financial gifts and loans from family and relatives to be able

to afford and to pay all those bail and attorneys' expenses.

Nevertheless, the 13th court of appeals said (Slip Opinion at 6):

In the case now before us, we cannot find that the trial court abused its discretion in failing to find that appellant could not pay for or give security for a \$9,000 statement of facts. Appellant did not introduce any evidence concerning her living expenses. Although there was evidence that appellant had been unemployed, the record reflects that appellant was able to secure bond and retain counsel.

FIRST REHEARING GROUND

While all Texas residents have statutory and constitutional homestead rights to keep creditors from forcing the sale of the debtor's urban homestead, appellant was unlawfully denied those homestead rights in the 13th court of appeals' opinion and resulting judgment in violation of appellant's right to equal protection under the Fourteenth Amendment to the U.S. Constitution.



SECOND REHEARING GROUND

Appellant was denied the due process guaranteed by the Fourteenth Amendment to the U.S. Constitution, when the 13th court of appeals in its opinion abandoned the district court's theory for rejecting appellant's indigency since appellant had funds to pay for the appellate record, because that district court's incorrect theory was disproved by appellant in the record and appellant's brief.

THIRD REHEARING GROUND

The 13th court of appeals reversibly erred in agreeing (Slip Opinion at 2) with the State's argument that appellant did not prove that she was unable to pay for all or a portion of the record or, alternatively provide security for all or a portion of the same.

FOURTH REHEARING GROUND

The 13th court of appeals reversibly erred in agreeing (Slip Opinion at 2) with



the State's contention that the record does not affirmatively show that the trial court abused its discretion in finding that appellant was not indigent.

FIFTH REHEARING GROUND

In violation of appellant's rights guaranteed by the ex post facto clause of the Federal Constitution's Article 1, § 9, cl. 3 and § 10, cl. 1, the 13th court of appeals reversibly erred in affirming the trial court's judgment on new legal requisites a Texas convicted criminal must satisfy before being legally entitled to obtain the appellate record at no personal cost so that this cause's unemployed appellant would be able to exercise her statutory right to obtain appellate review of the judgment of conviction entered against her by the trial court.

SIXTH REHEARING GROUND

On September 26, 1989, the Court of Criminal Appeals reversibly erred in denying



appellant's September 1989 motion to abate appeal and to remand the cause to the district court, since conditions have so changed while this cause was on appeal.

SEVENTH REHEARING GROUND

On September 26, 1989, the Court of Criminal Appeals reversibly erred in denying appellant's September 1989 motion to supplement information concerning both appellant's p.d.r. and her current expenses and changed conditions now that there has been a cessation of all income (government benefits) to support appellant and her child.

[The remainder of this motion is omitted here].



OFFICIAL NOTICE
COURT OF CRIMINAL APPEALS



RE: Case No. 1085-89

STYLE: Fishman, Rita, Iris

On this day the Appellant's Motion for Rehearing was denied.
JUDGES CLINTON & TEAGUE WOULD GRANT ON NO. 1.

November 29, 1989

COA#: 13-88-00181-CR

Thomas Lowe, Clerk

COURT OF CRIMINAL APPEALS
P.O. BOX 12308, CAPITAL STATION
AUSTIN, TEXAS 78711

MAIL TO:

Joseph A. Connors III
P. O. Box 5838
McAllen, TX 78502



OFFICIAL NOTICE
COURT OF CRIMINAL APPEALS



AUSTIN, TEXAS
RECEIVED
Case No. 1085-89
November 9, 1989
MOTION FOR REHEARING WAS
FILED WITH THIS COURT.
ON THIS DAY THE APPELLANT'S MOTION FOR REHEARING WAS
FILED WITH THIS COURT.

AUSTIN, TEXAS
RECEIVED
Case No. 1085-89
November 9, 1989
MOTION FOR REHEARING WAS
FILED WITH THIS COURT.
ON THIS DAY THE APPELLANT'S MOTION FOR REHEARING WAS
FILED WITH THIS COURT.

Thomas Lowe, Clerk

COURT OF CRIMINAL APPEALS
P.O. BOX 12308, CAPITAL STATION
AUSTIN, TEXAS 78711

Joseph A. Connors III
P. O. Box 5838
McAllen, TX 78502

MAIL TO:

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OFFICIAL NOTICE

COURT OF CRIMINAL APPEALS



RE: Case No. 1051-85-89
SPAFFER Fissman, Rita Iris
On this day the Appellant's Motion to Abate and to Supplement
the Record has been denied.

AUSTIN, TEXAS SEP 26 1989
DOA# 13588-00181-CR
SEP26'89

CLIENT'S COPY

mailed to Myron Vinson, Rita Iris
Bishman, and Mr. & Mrs. Barnett
Danner on 9/28/89. Thomas Lowe, Clerk

COURT OF CRIMINAL APPEALS
PO BOX 12308, CAPITAL STATION
AUSTIN, TEXAS 78711

Joseph A. Connors III
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McAllen, TX 78502

MAIL TO:

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